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Supreme Court, U.S.
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No. .

In the Supreme Court of the United States.

OCTOBER TERM, 1985.

COMMONWEALTH ELECTRIC COMPANY,
PETITIONER,

v.

DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

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Questions Presented.

Under the Federal Power Act and this Court's recent decision in *Nantahala Power & Light Co.* v. *Thornburg*, ____ U.S. ____ (No. 85-568, June 17, 1986), the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction to regulate all terms of wholesale electric rates and state regulatory commissions must permit retail electric companies to recover costs incurred as a result of federal tariffs. This case presents three closely related questions involving the power of a state regulatory commission to avoid the Filed Rate Doctrine and restrict retail electric company recovery of costs incurred as a result of the terms of a federal tariff by finding that the wholesale supplier was imprudent:

1. Whether the Federal Power Act permits a state regulatory commission setting retail rates to avoid the Filed Rate Doctrine and "trap" costs incurred by the retailer as a result of the terms of a federal tariff by imputing to the retailer the imprudence of its wholesale supplier?
2. Whether the Commerce Clause permits a state regulatory commission to influence retailer choice among wholesale supply options by interpreting the applicable federal tariff so as to impute to the retailer the imprudence of its wholesale supplier?
3. Whether the Due Process Clause permits a state regulatory commission to penalize a retailer based on a finding, in a proceeding to which the retailer was not a party, that its wholesale supplier was imprudent?

Rule 28.1 Statement.

The parent of Commonwealth Electric Company is the Commonwealth Energy System, a Massachusetts business trust. Commonwealth Electric Company has no subsidiaries. The following are affiliates of Commonwealth Electric Company: Cambridge Electric Light Company, Canal Electric Company, Commonwealth Gas Company, COM/Energy Steam Company, COM/Energy Services Company, COM/Energy Acushnet Realty, COM/Energy Cambridge Realty, COM/Energy Freetown Realty, COM/Energy Research Park Realty Trust, Darvel Realty Trust and Hopkinton LNG Corp.

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v.

DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

The petitioner, Commonwealth Electric Company ("Com/Electric"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, entered in the within proceeding on April 22, 1986.

Opinions Below.

The decision of the Massachusetts Supreme Judicial Court appealed herein is reported at 397 Mass. 361, 491 N.E.2d 1035

(1986). Such opinion is reprinted in the appendix hereto, App. A, pp. 2a-26a. The decisions of the Department of Public Utilities of the Commonwealth of Massachusetts, D.P.U. 1003-G-6, dated September 22, 1982, and D.P.U. 1003-H, dated October 1, 1982, are not reported. Such decisions are reprinted in the appendix hereto, App. B, pp. 27a-52a and pp. 53a-62a.

Jurisdiction.

In its decision and order D.P.U. 1003-G-6, dated September 22, 1982, the Massachusetts Department of Public Utilities ("MDPU") imputed to Com/Electric the imprudence of the sole owner and operator of the Pilgrim 1 power plant (Com/Electric's wholesale supplier) during an outage at said plant. On that basis, the MDPU ordered Com/Electric to refund to its ratepayers certain costs incurred by it in obtaining power to replace that which would have been received from Pilgrim 1. The MDPU's order in D.P.U. 1003-H, dated October 1, 1982, simply implemented D.P.U. 1003-G-6.

On April 22, 1986, the Massachusetts Supreme Judicial Court entered its judgment and opinion affirming the MDPU orders in all respects. The jurisdiction of this Court to review such judgment of the Massachusetts Supreme Judicial Court is invoked under 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions.

Supremacy Clause, United States Constitution, Article VI, Clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ..

Commerce Clause, United States Constitution, Article I, Section 8, Clause 3 provides:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States . . ..

Fourteenth Amendment, United States Constitution, Section 1, provides:

> [N]or shall any State deprive any person of . . . property, without due process of law . . ..

The pertinent provisions of the Federal Power Act ("FPA"), §§ 201(a), 205, 206, 207 and 306, 16 U.S.C. §§ 824(a), 824d, 824e, 824f and 825e, and of the General Laws of the Commonwealth of Massachusetts, M.G.L. c. 164, § 94G, are reprinted in the appendix hereto, App. C and App. D, pp. 63a-67a and pp. 68a-75a.

Statement of the Case.

Wholesale electric power in the United States is produced by a variety of sources that are so interconnected that the wholesale power supply system is truly national in character. Recognizing this, the structure which Congress created in the Federal Power Act vests all jurisdiction over matters directly or indirectly affecting wholesale electric tariffs and transactions

in FERC. This Court's recent decision in *Nantahala Power & Light Co.* v. *Thornburg*, ____ U.S. ____ (No. 85-568, June 17, 1986), likewise recognized the comprehensive extent of the system of wholesale electric supply and reaffirmed the "bright line" between federal and state jurisdiction. *Nantahala* rejected a state regulatory commission's attempt to prevent retail recovery of costs incurred under a wholesale supply contract by finding FERC's allocation of low cost hydroelectric power to the retailer to be unreasonable. In this case the state regulatory commission employed a different legal theory in an attempt, thus far successful, to avoid that "bright line."

In this case the state regulatory commission sought to prevent retail recovery of costs by imputing to the retailer a finding, made in a proceeding to which the retailer was not a party, that the wholesale supplier had been imprudent. Such decision presents another attempt by state regulatory commissions to challenge FERC's exclusive jurisdiction over the national system of wholesale electric supply. The legal theory adopted by the state regulatory commission below conflicts with the line of cases culminating in this Court's recent *Nantahala* decision, the Filed Rate Doctrine forcefully reaffirmed therein, the Narragansett Doctrine,[1] and discourages retail electric companies from utilizing FERC endorsed wholesale electric supply options to meet the nation's electricity needs. The case by case approach adopted by the decision below presents another serious challenge by the states to the "bright line" created by the decisions of this Court.

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[1] The Narragansett Doctrine requires state regulatory agencies setting retail rates to permit retail electric companies to recover all costs incurred by them pursuant to federal tariffs. Such Doctrine derives from the decision in *Narragansett Electric Co.* v. *Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. den.*, 435 U.S. 972 (1978) and was adopted by this Court in *Nantahala*.

BACKGROUND.

In 1972, Com/Electric (a retail electric utility company) entered a wholesale power supply contract (the "Pilgrim Contract") with Boston Edison Company ("BECO") for 11% of the capacity of and energy produced by BECO's newly constructed Pilgrim 1 nuclear-fired generating plant ("Pilgrim 1") (App. E). That source was one of many constituting Com/Electric's supply plan.[2] Pilgrim 1 has delivered low cost electricity to Com/Electric since that time. Such cost savings due to economies of scale could not have been achieved by the smaller Com/Electric alone. It is the terms of the Pilgrim Contract that underlie the controversy at hand.

Com/Electric agreed to pay BECO 11% of the costs to construct and operate Pilgrim 1 in exchange for 11% of the power generated thereby (App. E, pp. 88a, 92a). BECO bore the risks of successful start-up and operation for five years (App. E, p. 84a) and, in the event of major outages, was obligated to extend the contract for periods equal in time to the length of the outages (App. E, p. 82a). Under Section A-3.1 of the Pilgrim Contract, BECO did "not guarantee a constant supply of . . . electricity" (App. E, p. 89a). Thus, the Pilgrim Contract contemplated that Com/Electric would be responsible for finding replacement power during an outage.

BECO filed the Pilgrim Contract with the Federal Power Commission ("FPC") which accepted the contract for filing (App. E, p. 118a). The FPC published the required notice, but neither the MDPU nor Massachusetts Attorney General intervened. Accordingly, the Pilgrim Contract went into effect in the form as filed.

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[2] Com/Electric also purchases power from other wholesalers, generates power itself and, as a member of New England Power Pool, purchases power from that pool.

Prior Proceedings.

This case arises out of two periodic proceedings before the Massachusetts Department of Public Utilities ("MDPU") in which Com/Electric sought approval under M.G.L. c. 164, § 94G, to establish a quarterly Power Cost Charge. The Power Cost Charge is designed to reimburse Com/Electric on a dollar-for-dollar basis, without mark-up, for costs incurred for purchasing power and for the cost of fuel used in generating electricity. In contrast, base rates permit the utility to earn a return on its investment. *See, Western Massachusetts Electric Co.* v. *Department of Public Utilities,* 373 Mass. 227, 232, 234, 366 N.E.2d 1232, 1236, 1237 (1977).

In the proceedings below, Com/Electric's recovery of costs incurred during a Pilgrim 1 plant outage was challenged. During such outage Com/Electric obtained its replacement power under FERC regulated contracts including the New England Power Pool Agreement, agreements with individual utility companies for wholesale sales of electricity, and by generating some of the power itself. Com/Electric presented extensive and undisputed evidence showing that it obtained the least expensive replacement power available and that approximately 80% of the replacement power was the cheapest oil-generated electricity in New England.

In its final order in *Commonwealth Electric Co.,* D.P.U. 1003-G-6 (1982) (App. B, p. 27a), the MDPU ordered Com/Electric to refund to its customers the extra costs incurred in obtaining power to replace that which would have been generated by Pilgrim 1 during Pilgrim 1 outage periods which the MDPU had found (in a separate proceeding to which Com/Electric was not a party) resulted from BECO's imprudence (App. B, pp. 44a, 48a).

The MDPU's statement of the issue before it presaged this Petition for Certiorari. The MDPU explained that "the existence of the contract with BECo as a FERC filed-rate does

not remove the question of the Company's imprudence from our jurisdiction" (App. B, p. 43a), and that:

> We also find that the filing of replacement power costs with FERC does not bar our inquiry. It is not the level of replacement power cost rates that the Department takes issue with, it is the need for the Company to rely on replacement power costs at all.

(App. B, pp. 43a-44a).

In imputing BECO's imprudence to Com/Electric, the MDPU rejected Com/Electric's preemption (App. B, p. 33a) and due process (App. B, pp. 33a-34a) arguments. Interpreting the Pilgrim Contract, the MDPU concluded that, despite Com/Electric's status as a contract purchaser of power from BECO under a federal rate, and despite BECO's sole ownership and operation of Pilgrim 1, Com/Electric should be treated as an owner of the Pilgrim 1 plant and should share financial responsibility for BECO's imprudence:

> We determine that in this instance the Company's life-of-the-unit contract creates the obligations and privileges of a joint owner in Pilgrim 1 and shall treat the two arrangements the same. . . .

(App. B, p. 41a). The MDPU also found that the provisions of the Pilgrim Contract provided inadequate recompense to Com/Electric in the event of an outage:

> [T]he contract provision in the BECo agreement that extended the agreement's expiration date when any Pilgrim 1 outage exceeds 120 days . . . could possibly

> mitigate damages, but the Department does not find that this particular contract extension, almost twenty years in the future, mitigates damages in this case . . . The present value of the benefit is tremendously speculative. . ..

(App. B, p. 42a).

The MDPU decision in D.P.U. 1003-H simply implemented the refund ordered in D.P.U. 1003-G-6. The disallowed costs amount to $552,513, plus interest (App. B, pp. 44a, 56a).

On October 8, 1982, Com/Electric timely filed with the Massachusetts Supreme Judicial Court a petition for appeal from the MDPU's decisions in D.P.U. 1003-G and D.P.U. 1003-H. On May 23, 1985, a single justice reserved and reported the case to the full court. On April 22, 1986, the Massachusetts Supreme Judicial Court rendered its decision, rejecting Com/Electric's preemption (App. A, pp. 16a-21a), commerce clause (App. A, pp. 21a-22a) and due process (App. A, p. 22a) arguments and affirming the MDPU orders in all respects. That court held that the MDPU's actions were not preempted because there was an absence of "hard evidence" of any conflict between the DPU action and federal law (App. A, p. 20a). The court found that the burdens on interstate commerce were "speculative" and not "clearly excessive" (App. A, p. 22a). Finally, the court found no deprivation of property and no lack of due process (App. A, p. 22a).

Following this Court's June 17, 1986, decision in *Nantahala*, Com/Electric filed a Petition for Rehearing with the Massachusetts Supreme Judicial Court, seeking reconsideration in light of *Nantahala*. The time for filing such a petition had expired prior to announcement of the *Nantahala* decision and on July 10, 1986, the Massachusetts Supreme Judicial Court denied Com/Electric's Petition for Rehearing without comment.

Reasons for Granting the Writ.

The decision below sharply and significantly conflicts with the Filed Rate Doctrine, the Narragansett Doctrine, this Court's recent decision in *Nantahala*, and the decisions cited therein. Resolution of such conflict is a matter of great national importance. State commissions have adopted a variety of legal theories to restrict retail electric companies from recovering costs incurred as a result of the terms of a federal tariff. *Nantahala* forcefully rejected such "trapping" of retailer costs but did not address situations in which imprudence has been alleged or found. In their ever increasing exercise of jurisdiction, state commissions can be expected to follow the MDPU's lead and seek to avoid the "bright line" reaffirmed in *Nantahala* by attempting to impute any imprudence in the chain of supply to the retail electric company within its jurisdiction. In fact, since *Nantahala* was announced, the MDPU has continued to assert its jurisdiction to investigate wholesale electric supply arrangements and to disallow costs incurred under FERC rates.[3] The issues presented in this case should be resolved now, before wholesaler prudence review by state commissions dislocates existing retail electric company financial commitments and expectations and causes extensive and unnecessary litigation.

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[3] In *Commonwealth Electric Co.*, D.P.U. 86-69 (June 30, 1986) and *Cambridge Electric Light Co.*, D.P.U. 86-70 (June 30, 1986) (appeals to be filed on or before July 21, 1986), the MDPU ordered retail electric companies to set performance goals for their wholesale suppliers and stated that the retailers must explain variances from such goals and be subject to penalty where goals are not met and adequate explanation is not provided.

I. The Decision Below Improperly and Substantially Infringes Upon FERC Jurisdiction.

A. *The Decision Below Is in Sharp Conflict with the Decisions of This Court.*

In *Nantahala*, this Court held that there is a "bright line" between federal and state jurisdiction over electric utilities and that a state regulatory commission is preempted from setting retail rates in a manner that does not permit recovery of costs incurred pursuant to a FERC filed rate. In stark contrast, the court below adopted a case by case analysis, found no preemption and, despite the Narragansett and Filed Rate Doctrines, permitted the MDPU to restrict Com/Electric's recovery of costs incurred pursuant to FERC filed tariffs, and effectively rewrote Com/Electric's federal tariff (the Pilgrim Contract).

The court below broadly construed the jurisdiction of a state regulatory commission. It held that in setting retail rates the MDPU was permitted to restrict Com/Electric's recovery of costs incurred pursuant to FERC filed tariffs. The conflict is clear: in *Nantahala* this Court found impermissible state interference with the scheme of a federal regulation just because retail rate recovery of costs incurred pursuant to a federal tariff was restricted; the court below found no such interference.

Nantahala reaffirmed that the Filed Rate Doctrine bars federal or state court review of a FERC filed rate; only FERC can review the reasonableness of such a rate. The Filed Rate Doctrine protects FERC's jurisdiction over wholesale transactions by ensuring "that sellers of . . . power . . . can recover the costs incurred by their payment of just and reasonable FERC-set rates." *Nantahala*, ____ U.S. ____, ____ (slip opinion at 16). Thus, the MDPU exceeded its jurisdiction by disallowing costs incurred by Com/Electric under or as a result of FERC-regulated tariffs.

Under the decision below, Com/Electric is caught in the typical Filed Rate Doctrine problem that this Court accurately described in *Nantahala* as that of a middleman being forced to absorb "trapped" costs. Com/Electric incurs costs under the FERC filed rates, but is not allowed to collect those costs from its retail customers. *Nantahala* bars this very result:

> [A] State may not exercise its undoubted jurisdiction over retail sales to prevent the [utility] . . . from recovering the costs of paying the FERC-approved rate . . . Such a "trapping" of costs is prohibited.

Nantahala, ____ U.S. ____, ____ (slip opinion at 16-17).

The MDPU's attempt to rewrite a FERC tariff is equally evident. *Nantahala* reaffirmed that the Filed Rate Doctrine extends not only to price terms of a FERC filed rate, but to other terms as well. ____ U.S. ____, ____ (slip opinion at 13); *Northern Natural Gas Co.* v. *State Corporation Comm'n*, 372 U.S. 84, 90-91 (1963). States may not directly or indirectly modify the terms of wholesale power supply contracts filed with FERC. *Massachusetts* v. *United States*, 729 F.2d 886 (1st Cir. 1984). Yet the MDPU has attempted exactly that in two ways: (1) it ignores the fact that Com/Electric's need to incur higher cost electricity derives from the terms of the Pilgrim Contract which do not provide for supply of low cost electricity during outages; and (2) it specifically ruled that the remedy the Pilgrim Contract provided in case of outages was inadequate (App. B, pp. 42a-43a). Where the filed rate contains a term that causes a need for the electric company to purchase higher priced electricity, the costs of such purchase, deriving as they do from a federal tariff, must be deemed reasonable at the retail level.

Perhaps even more repugnant to *Nantahala* and the Filed Rate Doctrine is that the MDPU explicitly reviewed Section 2.3

of the Pilgrim Contract (App. E, p. 82a) and found that such term provided an inadequate remedy for consumers in the case of outages (App. B, pp. 42a-43a). That term provided for an extension of the Pilgrim Contract in the event of a prolonged Pilgrim 1 outage. The MDPU considered such remedy inadequate:

> The Department finds that the contract provision in the BECo agreement that extended the agreement's expiration date when any Pilgrim 1 outage exceeds 120 days . . . could possibly mitigate damages, but the Department does not find that this particular contract extension, almost twenty years in the future, mitigates damages in this case . . . The present value of the benefit is tremendously speculative . . ..

(App. B, p. 42a). In finding that Com/Electric had not obtained sufficient benefits for its customers under Section 2.3 of the Pilgrim Contract, the MDPU exceeded its jurisdiction by questioning the reasonableness of a term of a FERC contract. *Montana-Dakota Utilities Co.* v. *Northwestern Public Services Co.*, 341 U.S. 246, 251-252 (1951); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981); *Massachusetts* v. *United States*, 729 F.2d 886, 888 (1st Cir. 1984). In this way too, the MDPU has crossed over the "bright line" into federal jurisdiction.

Accordingly, the MDPU was preempted from inquiring into Com/Electric's need "to rely on replacement power" (App. B, p. 44a). Not only is the MDPU preempted from reviewing a FERC filed rate and ruling it to be unreasonable, but it is preempted from revising that rate. Just as Nantahala's federal rate determined the amount of low cost TVA power to which Nantahala was entitled (by reason of allocation), Com/Electric's federal rate determined the amount of low cost Pilgrim 1

power to which Com/Electric was entitled (by reason of no guarantee of supply or indemnity for higher cost replacement power). Once Com/Electric's (and Nantahala's) tariff governing the relevant purchase was filed at FERC, the utility had no choice concerning the purchase of higher cost power; the terms of the tariff made it inevitable that higher cost power would have to be purchased.

Just as North Carolina was preempted from rewriting Nantahala's contract to provide retail ratepayers more low cost power, the MDPU is preempted from rewriting the Pilgrim Contract to provide a guaranteed supply of low priced electricity (as though Pilgrim were operating) during outages. Such uncontrolled state regulation not only violates principles of preemption, but ignores the proper procedure established under the FPA for investigation of the reasonableness of the tariff, 16 U.S.C. § 824e, or of the performance of the wholesale generator. 16 U.S.C. § 824f.

The decision below thus constitutes a significant challenge to FERC's wholesale electric regulation. Such challenge will not disappear following the *Nantahala* decision because the justification for the MDPU's action — a finding of imprudence — was crafted in a way that will exploit the question left open in *Nantahala*. ____ U.S. ____, ____ (slip opinion at 19).

B. *The MDPU Action Below Challenges the Congressional Scheme for Wholesale Electric Regulation.*

The Massachusetts court has established a jurisdictional test which results in a serious challenge to the "bright line" between federal and state jurisdiction over sale of electricity established by this Court in *Federal Power Comm'n* v. *Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964) and most recently affirmed in *Nantahala*. Despite the "bright line" created by such decisions, the decision below requires a demonstration

"by hard evidence how the action of the [state commission] will frustrate the full purposes and objectives of Congress in enacting the FPA" (App. A, p. 20a).

The court below held that its own Filed Rate Doctrine case, *Eastern Edison Co.* v. *Department of Public Utilities,* 388 Mass. 292, 446 N.E.2d 684 (1983) was not controlling because no question of imprudence had been raised in *Eastern Edison*[4] (App. A, p. 19a). Thus, before finding that state jurisdiction is preempted, the decision below requires a detailed case by case review of (1) how the state may be interfering with FERC jurisdiction, and (2) whether there is an allegation of imprudence. Under the decision below it is not sufficient to show that the replacement power costs were incurred as a result of the terms of a federal tariff, or that the costs disallowed were incurred under a federal tariff. This test for preemption articulated below not only erases the "bright line" adopted in *Southern California Edison* and reaffirmed in *Nantahala,* but provides the blueprint for states to infringe upon FERC jurisdiction.

Imprudence can always be alleged to have occurred in some link in the chain of electric supply. If a state may avoid the "bright line" between federal and state jurisdiction and the statutory procedure for FERC review of wholesale performance, see FPA §§ 205, 206, 207 and 306, 16 U.S.C. §§ 824d, 824e, 824f and 825e; see also *Attorney General* v. *New England Power Company,* 33 FERC 63,042 (1985), by discovering imprudence in the chain of electric supply and then imputing such imprudence to the retail electric company over which it has jurisdiction, there will be an ever increasing number of

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[4] The facts of *Eastern Edison* belie such analysis since the event underlying the *Eastern Edison* case was cancellation of the Pilgrim 2 nuclear plant and questions of imprudence were raised before FERC in that cancellation proceeding. *Montaup Electric Co.,* 31 FERC 63,003 (1985).

state proceedings seeking to establish that its citizens experienced excessive rates because of wholesaler imprudence.[5]

In the instant case, the asserted imprudence concerned the operation and maintenance practices of a wholesale supplier of electricity. Another case might involve an allegation that a wholesale supplier made imprudent choices in selecting its generation mix or that the wholesaler's cost of service increased as a result of imprudent management. If an allegation of imprudent action by the wholesale seller was enough to overcome the "bright line" between federal and state jurisdiction, the states would become involved in review of all operational practices and decisions of FERC-regulated sellers and the states would have virtually unbounded jurisdiction to disregard FERC jurisdiction and to bar retail electric companies from recovering costs incurred as a result of federal tariffs. Such a result is clearly contrary to the intent of Congress but is the result sanctioned by the decision below.

C. *State Inquiry Into the Prudence of Wholesale Electricity Suppliers Will Discourage Inter-Utility Cooperation and Bulk Power Supply Agreements, Thus Limiting Viable Wholesale Supply Options.*

The rule of law adopted by the decision below will discourage retail electric companies from selecting one of the valuablesupply options endorsed by FERC. In the Federal Power Act,

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[5] Such proceedings have already begun in Massachusetts. In *Western Massachusetts Electric Co.*, M.D.P.U. 85-8F-2 (1985), appeal docketed at the Massachusetts Supreme Judicial Court as C.A. No. 85-419, and *Cambridge Electric Light Co.*, M.D.P.U. 85-2F-1 (1986), appeal docketed at the Massachusetts Supreme Judicial Court as C.A. No. 86-115, the MDPU inquired into the prudence of a Connecticut wholesaler, found the wholesaler to be imprudent, imputed such imprudence to the Massachusetts retailer, and on that basis restricted the retailer's recovery of replacement power costs incurred during an outage at the Connecticut wholesaler's plant.

Congress recognized that the electric industry, with its pooling of supplies, joint ownership of generation plants, joint planning for generation, and myriad interstate interconnections, was inherently interstate in nature, and that uncontrolled state regulation of energy production would interfere with broader national interests. It therefore established FERC's precursor as the sole agency responsible for bulk power supply arrangements, including transmission, sales, and generation. 16 U.S.C. § 824(a). This structure was created to foster bulk power generation so as to serve the national interest of providing low cost electricity on a regional basis.

State inquiry into the prudence of wholesale electricity suppliers will discourage participation in the bulk supply arrangements that have provided great economies of scale, benefitting consumers across the nation. Such a result will occur because state decisions penalizing a retailer for the imprudence of its wholesale supplier would force the retailer to absorb "trapped" costs, despite no imprudence of its own.[6]

In the past, retail electric companies have been able to choose among a variety of available supply options, including long term bulk purchases from larger, more economical plants owned and operated by others. Under such arrangements the retail electric company (and its customers) benefits from the economies of scale of a project beyond its means to construct and operate on its own. As in the case of Com/Electric, the retailer has no control over operations and receives no profit on its resale of purchased power. If the retailer is nevertheless forced to run the risk of incurring "trapped" costs if the whole-

[6] This case presents no issue of retailer imprudence. There is no suggestion in this case that Com/Electric made an imprudent decision when it entered the Pilgrim Contract or when it decided among replacement power alternatives during the Pilgrim 1 outage. In fact, the record demonstrates that the Pilgrim Contract had provided low cost power for Com/Electric's customers for over a decade and that 80% of the replacement power purchased by Com/Electric was the cheapest oil-generated power in New England.

saler is imprudent, such risk makes entry into such arrangements very unattractive. Alternatively, if the retailer chooses to participate in such a transaction to take advantage of its economies of scale, its effort to avoid the risk of wholesaler imprudence by duplicating all of the wholesaler's efforts in design and supervision of operations, maintenance, etc., would nullify the very economies of scale which made the transaction attractive. In either instance a valuable supply option endorsed by FERC is made unattractive by the holding below.

The alternative is the structure Congress created in the FPA. The interests of states and consumers are protected not by local interference with federal tariffs, but by FERC's consideration of the reasonableness of the wholesale contract's terms, 16 U.S.C. § 824d, and review of state commission complaints about a wholesaler's imprudence. 16 U.S.C. §§ 824e, 824f, 825e. See, e.g., *Attorney General* v. *New England Power Co.*, 33 FERC 63,042 (1985). These procedures allow for consideration of the wholesale transaction in the one forum whose decision will avoid "trapped" costs.

The states' increasing tendency to consider prudence issues during retail rate proceedings, see, e.g., *Pike County Light & Power Co.* v. *Pennsylvania Public Utilities Commission*, 77 Pa. Cmwlth. 268, 465 A.2d 735 (1983); *Appeal of Sinclair Machine Products, Inc.*, 126 N.H. 822, 498, A.2d 696 (1985), and the unsettling effect which the decision below will have on the "bright line" between federal and state jurisdiction when prudence issues are involved, make it particularly important that the Court decide the issue presented in this case at this time.

II. The Decision Below Impermissibly Burdens Interstate Commerce by Discouraging Election of a Wholesale Supply Option Sanctioned by FERC.

The MDPU's cost disallowance also violates the Commerce Clause. U.S. Const., Art. 1, § 8, Cl. 3. One of several bulk supply arrangements sanctioned by FERC is the kind involved here — a unit supply contract. Such contracts have been found to further the public interest since they encourage regional cooperation and joint planning. *See, Connecticut Light & Power Co.*, 52 FPC 175 (1974). The potential exposure to "trapped" costs resulting from the decision below discourages such arrangements. What is encouraged instead is self generation which although less economical, eliminates the risk of liability for the acts of others who are outside the retailer's control. By discouraging a supply arrangement commonly recognized to be cost beneficial to the citizens of all states, the decision below impermissibly burdens interstate commerce.

The decision below further burdens interstate commerce by sanctioning review of the reasonableness of those terms of FERC-filed contracts which compensate the purchaser in the event of wholesaler imprudence. If such review is permitted in a forum other than FERC, the ability of retail electric companies to recover costs incurred as a result of FERC regulated rates would become uncertain. Such uncertainty and the potential for differing interpretations from state to state would undermine the entire system of wholesale power contracts and have a negative impact on investor perceptions, the ability to raise capital and capital costs. *See, Massachusetts* v. *United States*, 729 F.2d 886, 888 (1st Cir. 1984). On the other hand, no benefits result from the MDPU's action. Whatever review and adjudication is necessary can be obtained through timely complaint to FERC in accordance with FERC rules. 16 U.S.C. §§ 824d, 824e, 824f and 825e. *See also, Attorney General* v. *New England Power Co.*, 33 FERC 63,042 (1985).

III. The Decision below Violates Due Process by Penalizing Com/Electric Based on a Finding, in a Proceeding to Which It Was Not a Party, That Conduct of Its Wholesale Electric Supplier Was Imprudent.

The United States Constitution (Amendment XIV, § 1) prohibits deprivation of property without due process. Here, the MDPU has forever deprived Com/Electric of the ability to recover the costs it was required to incur by reason of the terms of the Pilgrim Contract. Such penalty was levied without any finding of wrong-doing by Com/Electric. Rather, the MDPU imputed to Com/Electric its finding in two earlier BECO proceedings that, "BECo had acted imprudently with regard to certain aspects of the Pilgrim 1 outage which extended from September 26, 1981, through April 8, 1982." (App. B, p. 39a).

The procedure followed by the MDPU was fundamentally unfair. Com/Electric was given no meaningful opportunity to contest the findings relied upon by the MDPU. This Court has held that the "rudiments of fair play . . . [must be] assured to every litigant" without compromise, especially before regulatory commissions like the MDPU which are granted broad powers. *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 304-305 (1937).

Furthermore, it is a violation of Com/Electric's due process rights to deny Com/Electric recovery of its costs in the absence of a finding that it was imprudent. *See, West Ohio Gas Co.* v. *Public Utilities Comm'n*, 294 U.S. 63, 68 (1935). This case is much like the *West Ohio Gas* case. There, the Ohio commission fixed the utility's transmission loss allowance at less than the 9% established by the record. Such order was reversed since there was no evidence showing any fault by the utility, nor any evidence suggesting that the utility could better its historical 9% transmission losses. Similarly in this case, the

Massachusetts commission has sought to penalize Com/Electric despite an absence of any evidence or finding that it was imprudent or could have done something more to avoid the costs in question. Thus, due process prevents the MDPU from penalizing Com/Electric for the imprudence of its wholesale supplier.

Conclusion.

The questions raised by this case are significant ones affecting the national system of wholesale electric supply. The states should not be permitted to adopt and expand upon the analysis of the MDPU and the Massachusetts court because of an absence of guidance from this Court.

For the foregoing reasons, petitioner respectfully submits that the writ should be granted and the case set down for full briefing and argument on the merits. In the alternative, the writ should be granted, the judgment below summarily vacated, and the case remanded to the Massachusetts Supreme Judicial Court with instructions that the case be reconsidered in light of this Court's recent *Nantahala* decision.

Respectfully submitted,

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Dated: July 18, 1986

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Appendix "A"

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, April 22, 1986.

IN THE CASE NO. SJC- 3913

COMMONWEALTH ELECTRIC COMPANY

vs.

DEPARTMENT OF PUBLIC UTITLITIES

pending in the Supreme Judicial
Court for the County of Suffolk No. 82-380

ORDERED, that the following entry be made in the docket; viz., —

The relief sought by Commonwealth Electric Company is denied, and a judgment is to enter in the county court affirming the orders of the DPU.

BY THE COURT,

Jean M. Kennett, CLERK.

April 22, 1986

See opinion on file.

COMMONWEALTH ELECTRIC COMPANY *vs.* DEPARTMENT OF PUBLIC UTILITIES.

Suffolk. October 10, 1985. — April 22, 1986.

Present: HENNESSEY, C.J., WILKINS, LIACOS, LYNCH, & O'CONNOR, JJ.

Public Utilities, Fuel charges, Electric company, Judicial review. *Electric Company*. *Department of Public Utilities*. *Due Process of Law*, Public utilities. *Constitutional Law*, Federal preemption, Interstate commerce. *Administrative Law*, Agency's authority, Findings, Judicial review.

The Department of Public Utilities did not err in determining, based upon provisions in a life-of-the-unit contract between a certain electric company and the operator of the Pilgrim 1 nuclear power station, that the electric company shared the obligations and responsibilities of a joint owner of the station, at least to the extent that the department could properly impute to the company a share of the liability for replacement power costs incurred as a result of imprudence by the station operator during a period when the station was out of service, and thus preclude the company from recovering these costs from its ratepayers. [ ]

General Laws c. 164, § 94G, empowered the Department of Public Utilities to impute to an electric company the imprudent conduct of the operator of a nuclear power station with which the company had a contract for the purchase of wholesale electric power, with the result that the company was precluded from recovering from its ratepayers the replacement power costs it incurred during a time when the nuclear power station was out of service. [ ]

The Department of Public Utilities, in inquiring into the prudence of a retail electric company in selecting its source of wholesale electric power and in imputing to the company certain imprudent conduct of one of its suppliers with which it had a contract for the purchase of wholesale electricity at rates subject to approval by the Federal Energy Regulatory Commission, did not interfere with the realization of the purposes and objectives of Congress in passing the Federal Power Act, 16 U.S.C. §§ 791a-828c (1982), and thus the department's statutory authority under G. L. c. 164, § 94G, was not preempted by Federal law. [ ]

LYNCH, J., dissenting.

The action of the Department of Public Utilities in imputing to an electric company the imprudent conduct of the operator of a nuclear power station with which the company had a contract for the purchase of whole-

sale electric power, thereby precluding the company from recovering certain replacement power costs from its retail customers, did not involve any issue which should have been raised in proceedings before the Federal Energy Regulatory Commission and thus was not an impermissible collateral attack on the wholesale rates approved by the Federal agency. [ ] LYNCH, J., dissenting.

In a proceeding for review of an order of the Department of Public Utilities an electric company made no showing that the commerce clause of the United States Constitution had been violated by the department's action imputing to the company certain imprudent conduct by the operator of a nuclear power station with which the company had a contract for the purchase of wholesale electric power at rates approved by the Federal Energy Regulatory Commission. [ ]

In a proceeding by an electric company challenging the action of the Department of Public Utilities in imputing to the company certain imprudent conduct by the operator of a nuclear power station with which the company had a contract for the purchase of wholesale electric power, thus precluding the company from recovering replacement power costs from its ratepayers, the company made no showing that it had been deprived of any property interest without due process of law. [ ]

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on October 8, 1982.

The case was reported by *Lynch*, J.

Sander A. Rikleen (*Eric J. Krathwohl* with him) for the plaintiff.

Thomas A. Barnico, Assistant Attorney General, for the defendant.

Paul K. Connolly, Jr., Adrienne M. Markham & John F. Finston, for Fitchburg Gas and Electric Light Company, amicus curiae, submitted a brief.

Thomas G. Robinson for Massachusetts Electric Company, amicus curiae, submitted a brief.

LIACOS, J. The Pilgrim Unit 1 nuclear power station (Pilgrim 1) was out of service for several months in 1981 and 1982. The Department of Public Utilities (DPU) issued a series of orders in which it found that the operator of Pilgrim 1, Boston Edison Company (Boston Edison), acted imprudently in certain aspects of the outage. We affirmed those orders. *Boston Edison Co.* v. *Department of Pub. Utils.*, 393 Mass. 244 (1984). Before

us now are appeals from a series of DPU orders imputing the imprudence of Boston Edison to the petitioner, Commonwealth Electric Company (company), thus precluding the company from recovering from its ratepayers certain purchased power costs attributable to that imprudence, and requiring the company to refund, with interest, the portion of those costs previously allowed. The company argues that, as matter of law, the DPU could not impute the imprudence of Boston Edison to the company, that the DPU acted beyond its statutory authority, and that regulation of its purchased power costs has been preempted by the Federal government. We affirm the orders.

We state the factual background of these proceedings. Commonwealth Electric Company is a retail electric utility company distributing electricity to consumers in forty communities in southeastern Massachusetts. The company owns and utilizes its own generating facilities to meet a portion of its customers' needs, but most of the electricity it sells is purchased at wholesale from other utility companies. On August 1, 1972, the company entered into an agreement with Boston Edison to purchase 11% of the capacity of Pilgrim 1. The agreement was filed with the Federal Power Commission (FPC) and was accepted by the FPC pursuant to § 205(d) of the Federal Power Act, 16 U.S.C. § 824(d) (1982) (FPC docket no. E-8138). The agreement was in effect during 1981 and 1982. The Pilgrim 1 outage made it necessary for the company to obtain replacement power for its customers at a cost greater than the cost of power the company normally would have obtained from Pilgrim 1.

On June 3, 1982, the company notified the DPU that it intended to apply for approval of a change in the allowed fuel charge in its next quarterly filing under G. L. c. 164, § 94G (*b*) (1984 ed.). The DPU issued a procedural order, D.P.U. 1003-G-1, which stated that the DPU intended to determine the company's liability for replacement power costs incurred as a result of Boston Edison's imprudence in the Pilgrim 1 outage. A series of hearings on this issue ensued. In the interim, the DPU authorized a quarterly fuel adjustment charge subject to refund, with interest, pending the outcome of the proceedings. D.P.U. 1003-G-2.

On September 22, 1982, the DPU issued its order. D.P.U. 1003-G-6. Among the DPU's findings was the following: "The Department finds that the Company shares responsibility for BECo's [Boston Edison's] imprudence during the Pilgrim 1 outage. Pursuant to its life-of-the-unit contract, ComElectric was not relieved of its service responsibilities, which include providing electricity at the lowest possible fuel cost; therefore, we believe that the Company is imputedly liable under G. L. c. 164, § 94G, for BECo's imprudence and that under that statute the Company's ratepayers should not pay the costs associated with the imprudent practices during the Pilgrim 1 outage." D.P.U. 1003-G-6, at 17-18. The DPU found the additional costs incurred by the company in the periods during which Boston Edison was imprudent to be $552,513. *Id.* at 21. The DPU ordered the company to return that amount, with interest of $43,450, to the ratepayers through a reduction in the fuel charge for October through December, 1982. D.P.U. 1003-H.

The company appealed from the orders of the DPU, under the authority granted in G. L. c. 25, § 5 (1984 ed.). A single justice reserved and reported the appeal.

The company makes essentially three claims of error: (1) The DPU legally could not impute to the company the imprudence of Boston Edison; (2) the DPU could not issue its orders without exceeding its authority under the provisions of G. L. c. 164, § 94G (1984 ed.); and (3) the DPU could not exercise regulatory authority over the relationship between the company and its wholesale suppliers of power because the Federal government has preempted that authority.

1. *Imputation of imprudence.* The DPU determined that the company shared the responsibilities and obligations of a joint owner of the Pilgrim 1 unit. This finding was based on the provisions of contract between the company and Boston Edison.

The company claims that it is in fact not an owner of the Pilgrim 1 unit. We do not read the decision of the DPU to be to the contrary. The DPU found that the company "does not have an ownership share in the Pilgrim 1 unit, [but that] its life-

of-the-unit contract is in all relevant respects here the same as partial ownership." The company contends, however, that the DPU erred in interpreting the company's contract with Boston Edison so as to find it "in all relevant respects here the same as partial ownership."

The DPU's interpretation was based on five sections of the contract set forth in the margin.[1] Pointing out the general rule that the terms and provisions of a contract are to be interpreted in the context of the entire contract, cf. *Glick* v. *Greenleaf*, 383 Mass. 290, 296 (1981); *McMahon* v. *Monarch Life Ins. Co.*, 345 Mass. 261, 264 (1962), the company draws our attention to clauses limiting the start-up risks it assumed; making Boston Edison responsible for financing, construction, licensing, staffing, operation, and maintenance of the facility; limiting the company's authority in decision making; imposing a standard of due diligence on Boston Edison; requiring Boston Edison to obtain insurance; and obligating Boston Edison to sell power to the company on terms as favorable as it granted

[1] Section 3.2 of the contract provides that the company has the right to consult with Boston Edison "concerning significant decisions with respect to construction or subsequent modifications of or additions to the Unit."

Section 8.1 explains the parties' intent in the event of extraordinary losses: "It is the intent of this Paragraph that Buyer [company] share with Seller [Boston Edison] any risk falling on Seller and arising pursuant to this Agreement to the extent of eleven percent (11%), and in such a manner that the risk of loss falling on Buyer is identical to such risk as would befall a complete owner of eleven percent (11%) of the Unit."

Section 9.2 is an agreement by the company to reimburse Boston Edison for 11% of the unrecovered value of the power plant in the event of a shutdown before the investment has been recovered.

In Appendix C, covering payment obligations, the parties established their intent through § C-1.1: "It is the intent of the parties that during the term of the Agreement, Buyer shall reimburse Seller during the term of this Agreement as provided herein for eleven percent (11%) of all costs incurred by Seller by virtue of: (1) the construction of, or any modifications of additions to the Unit, and (2) the operation of or maintenance to the Unit."

Appendix A, § A-3.1, detailing performance standards, sets forth the assumption of risk of nonperformance as follows: "The intent of this provision is that Buyer shall assume the risks of non-delivery of electricity hereunder caused by the hazards of the business to the same extent as if it were itself operating the Seller's Unit for the purpose of supplying itself with electricity . . . ."

to any buyer. These provisions were not mentioned in the DPU decisions.

Assuming that the contract provisions shifting responsibility and risk to Boston Edison are indicators of Boston Edison's predominant ownership role, we do not agree, as the company argues, that the DPU erred in finding enough indicators of the company's responsibilities and obligations to justify the conclusion that the company's role is the same as partial ownership for the purposes of the instant inquiry.[2]

The DPU rested its decision on the imputed imprudence of Boston Edison and did not reach the question of the company's own imprudence. The company argues that it cannot be held responsible for Boston Edison's acts, absent proof of its control over Boston Edison.[3]

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[2] We do not conclude that actual or constructive ownership is a prerequisite to imputation of imprudence to a public utility. The analysis of the DPU includes the finding that the contract created the obligations and privileges of a joint owner. D.P.U. 1003-G-6, at 17. It is not the company's similarity to an owner that is dispositive, however, but its nondelegable statutory obligations. Therefore, although we have in the past construed the term "owner" broadly to effectuate the legislative purpose, see *Coyle* v. *Swanson*, 345 Mass. 126 (1962), and found that its meaning is flexible, see *Northgate Constr. Co.* v. *State Tax Comm'n*, 377 Mass. 205, 208 (1979); *Animal Rescue League of Boston* v. *Assessors of Bourne*, 310 Mass. 330, 333 (1941), there is no need to analyze today what attributes a public utility must possess to be considered an "owner" by the DPU.

[3] In support of its argument, the company cites decisions of administrative law judges of the Federal Energy Regulatory Commission (FERC), decisions of Federal courts that examined Environmental Protection Agency (EPA) regulations imposing vicarious liability, and general principles of tort and agency law.

The DPU distinguishes the FERC administrative decisions, arguing that the statutory authority of the FERC differs from that of the DPU. Though perhaps persuasive authority by analogy, decisions of a foreign administrative agency do not control Massachusetts law. Cf. *Bonitz* v. *Travelers Ins. Co.*, 374 Mass. 327, 329-330 (1978); *Dexter* v. *State Tax Comm'n*, 350 Mass. 380, 382-383 (1966). Similarly, a decision based on EPA's lack of statutory authority to impose vicarious liability does not control our consideration of the DPU's imputation of imprudence. Cf. *Commonwealth* v. *Masskow*, 362 Mass. 662, 667 (1972); *Commonwealth* v. *LePage*, 352 Mass. 403, 409 (1967); *Dexter* v. *State Tax Comm'n*, *supra*.

In our view, it is the dissenting opinion of Wright, J., in the cited case *Amoco Oil Co.* v. *EPA*, 543 F.2d 270, 279-284 (D.C. Cir. 1976), that is

The company relies most heavily on general principles of tort and agency law that tie vicarious liability to the right to control, citing *Caron* v. *Lynn Sand & Stone Co.*, 270 Mass. 340, 346 (1930) (joint enterprise), *Khoury* v. *Edison Elec. Illuminating Co.*, 265 Mass. 236, 238 (1928) (right to control determines master-servant relationship and thus whether respondeat superior applies), and *Trent* v. *Atlantic City Elec. Co.*, 334 F.2d 847, 858-859, 864 (3d Cir. 1964) (applying New Jersey law). The company asserts that, while a joint venturer may be found imputedly liable for the acts of his coventurer, *Caron* v. *Lynn Sand & Stone Co.*, *supra*, he must have an equal right to direct or control the coventurer, *Caron*, *supra* at 346, and an intent to be a joint venturer, *Cardullo* v. *Landau*, 329 Mass. 5, 8 (1952). The company claims that it "clearly does not have control over" Boston Edison and that it does not "even share control over construction, operation or maintenance of the Pilgrim 1 Plant." Since the company did not have an equal right of control, and no intent to be a joint venturer was shown in the record, the company claims that it cannot be imputedly liable as a joint venturer.

In our view, reliance on tort analogies to define a public utility's responsibility in a regulated area of rate and fuel costs is unpersuasive. We find ample justification for the DPU's decision in the policy manifested by the statutory scheme of public utility regulation. The DPU was warranted in finding that the provisions of the contract reveal the company's intent

illuminating for this case. Judge Wright notes that "[v]icarious liability — like other forms of strict liability — is imposed not because there is 'compelling evidence of control,' but rather because some properly authorized agency of government — court, legislature, or administrative body — has determined that such an allocation of responsibility will serve society's ends. The determination may rest on the judgment that it is more just to impose liability on the party who entered the business knowing of the general hazards, rather than risk leaving the entire loss on the innocent injured party" (footnote omitted). *Id.* at 281. As between the stockholders and the ratepayers of the company, it is the stockholders who are more aware of the general hazards of the business, and the ratepayers who are the more innocent parties.

to be treated as a joint owner and impose the kinds of risks and obligations ordinarily associated with ownership. See note 1 *supra*. The DPU relied on policy rationales supporting the imputation of imprudence to the company. "[T]here should be uniform treatment of companies involved in the same project, and . . . allowing the form of the contract to control a company's responsibility for providing service at the lowest possible cost would create an untoward incentive for utilities to establish ownership forms that exempt them from liability." D.P.U. 1003-G-6, at 18 n.1. "[T]his statute [G. L. c. 164, § 94G] was intended to operate consistently for all electric utilities the Department regulates . . . ." *Id.* at 20. Such a statement of policy imperatives is wholly within the DPU's responsibility in administering the statutory regulatory scheme. *Fitchburg Gas & Elec. Light Co.* v. *Department of Pub. Utils.*, 394 Mass. 671, 680 (1985) (*Fitchburg II*). See G. L. c. 164, § 76 (1984 ed.).

The utility and its shareholders are protected from the risks associated with competition.[4] The shareholders are protected, however, only from risks normally due to competition, not from all risks. They must, just as must shareholders of a competitive private corporation, accept the risks of the company's failure. Failure could be due to the negligence or incompetence or simply unfortunate decisions of the company's directors,[5] to the imprudence of its contractors, or to conditions entirely external, such as the oil shortages of the last decade. The shareholders cannot automatically shift those risks to the ratepayers. The ratepayers are not the guarantors of the company's success.

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[4] In return for its shelter from the uncertainties of the competitive market place, the public utility assumes the responsibility to provide adequate service at reasonable rates. See *Fitchburg II*, *supra*, and authorities cited therein. This duty is imposed by statute and, though its performance may be delegated, the duty may not.

[5] The ratepayers should not bear the loss where the business judgment of the company's directors is inconsistent with valid policies of the DPU. *Fitchburg Gas & Elec. Light Co.* v. *Department of Pub. Utils.*, 375 Mass. 571, 578-579 (1978) (*Fitchburg I*).

We discuss policy recognizing that "questions of policy are for [the] administrative agency." *Attorney Gen.* v. *Department of Pub. Utils.*, 390 Mass. 208, 228 (1983). There are other policy considerations involved. Imputation of imprudence encourages vigilant oversight by those who have delegated their responsibilities. The DPU stands as the agency charged with the responsibility for protecting the interests of the ratepayers. We note that the DPU's role in guarding the ratepayers' interests and assuring that utility companies are not encouraged to avoid their responsibilities is supported by long-standing decisions in which we have found the legislative purpose to be protection of ratepayers. See *Boston* v. *Edison Elec. Illuminating Co.*, 242 Mass. 305, 309 (1922). "[T]he function of the [DPU] is the protection of public interests and not the promotion of private interests." *Lowell Gas Light Co.* v. *Department of Pub. Utils.*, 319 Mass. 46, 52 (1946). It is the goal of the statutes and regulations "to ensure to the public the availability of service at reasonable cost from private industry protected from the risk of competition." *Attorney Gen.* v. *Department of Pub. Utils.*, *supra* at 235 (Liacos, J., dissenting).

2. *Statutory authority.* The company argues that the relevant legislative grant of authority to the DPU, G. L. c. 164, § 94G, does not authorize the DPU to act as it has in this case. In particular, the company says that under § 94G (*a*) the DPU (1) cannot disallow costs based on vicarious liability; (2) must make a "finding" of imprudent conduct by the company before disallowing costs; and (3) cannot disallow costs of purchased power. The DPU responds that the plain language of the statute, the legislative purpose and policy, and application of principles of statutory construction demonstrate that the DPU has the authority to disallow costs of purchased power due to the company's imputed imprudence.

It is our task to interpret the statute. *Casey* v. *Massachusetts Elec. Co.*, 392 Mass. 876, 879 (1984). *Cleary* v. *Cardullo's, Inc.*, 347 Mass. 337, 334 (1964). An examination of the statute[6]

[6]General Laws c. 164, § 94G (*a*) (1984 ed.) provides, in pertinent part: "At least once a year, on dates set by the department, each electric company

reveals that § 94G (*a*) sets forth the procedure for approval and review of an electric company's annual proposed performance program. The performance program was intended to stimulate planning by the utilities to achieve the "most efficient and economical use of fuel" in the face of the dramatic increases in the price of oil shortly before the legislation was enacted. See Message of the Governor, 1981 House Doc. No. 5012. Section 94G (*b*) governs the approval and adjustment of the fuel charge. The statute forces planning by utility companies seeking approval of a fuel charge through mandatory participation in the energy conservation performance program described in § 94G (*a*). Also linking the two provisions is DPU review under § 94G (*a*) of a company's success in meeting its performance program goals.

If the company's performance varies from its approved performance targets, the DPU may order the company to explain the variance at its next fuel charge hearing under § 94G (*b*). "In the course of such hearing, the department shall investigate such variance, may otherwise inquire into an issue related to the procurement or use of fuel or purchased power included in the fuel charge and properly raised by any party, and, in either event, shall make a finding whether the company failed to make all reasonable or prudent efforts consistent with accepted management practices, safety and reliability of electric service and reasonable regional power exhange requirements to achieve the lowest posible overall costs to the customers

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having a fuel charge approved by the department shall file with the department and simultaneously with the attorney general a proposed performance program relating to fuel procurement and use. Such program shall describe for the time period or periods designated reasonably attainable targets which shall include a thermal efficiency target for the performance of the company . . . . Each such electric company shall file with the department, with the frequency and in the standardized form established by the department, data and reports on the actual unit by unit and system performance of the company with respect to each target set forth in the approved performance program. If any such periodic report indicates that actual system performance varied from the approved targets, upon order by the department or petition of any party to the proceeding the company shall, at the next following fuel charge hearing under subsection (*b*), present evidence explaining such variance."

of the company for the procurement and use of fuel and purchased power included in the fuel charge." G. L. c. 164, § 94G (*a*), lines 63-72.

The company, though it had received DPU approval for a fuel charge, had no approved § 94G (*a*) performance program in place during the relevant time periods. The DPU justified its application of § 94G (*a*), nevertheless, under § 7 of the Fuel Charge Act, St. 1981, c. 375. That section provides: "Any fuel charges approved subsequent to the effective date of this act and prior to the approval of the initial performance program pursuant to subsections (*a*) and (*b*) of section ninety-four G of chapter one hundred and sixty-four of the General Laws, shall be subject to review and such other provisions of said subsections (*a*) and (*b*)."[7]

The review procedure of § 94G (*a*) permits the deduction of imprudently incurred fuel costs from the fuel charge for the next quarter. The statute provides for this deduction in the following sentence: "If the department finds that the company has been unreasonable or imprudent in such performance, in light of the facts which were known or should reasonably have been known by the company at the time of the actions in question, it shall deduct from the fuel charge proposed for the next quarter or such other period as it deems proper the amount of those fuel costs determined by the department to be directly attributable to the unreasonable or imprudent performance." G. L. c. 164, § 94G (*a*), lines 72-79.

The Legislature did not restrict the DPU to inquiry as to the performance of a utility company "*except for*" the portions of its responsibility delegated to independent contractors or others. The statutory instructions are quite broad. The DPU is required to determine "whether the company failed to make all reasonable or prudent efforts consistent with accepted management practices, safety and reliability of electric service and reasonable regional power exchange requirements to achieve the lowest possible overall costs to the customers of the company for

[7] There is no dispute as to the applicability of the statute.

the procurement and use of fuel and purchased power included in the fuel charge." G. L. c. 164, § 94G (*a*), lines 67-72. The DPU is directed to inquire into issues *related* to the fuel charge, *id.* at line 65 (in addition to those variances from the performance target that triggered the hearing). The scope of the inquiry extends to "*all* reasonable or prudent efforts consistent with accepted management practices," (emphasis added) *id.* at lines 67-68. The modifier "all" emphasizes the Legislature's intent not to restrict the DPU's investigation. It could not be maintained seriously that "accepted management practices," *id.* at line 68, do not include the subcontracting of work. Yet if the DPU can investigate only those actions taken by direct employees of the utility company, the work done by a subcontractor would be cloaked from oversight.

The goal of the investigation is clearly spelled out in the statute and is reflected in our consistent and long-standing interpretation of the State's role in regulating public utilities, see *Lowell Gas Light Co.* v. *Department of Pub. Utils.*, *supra*; *Boston* v. *Edison Elec. Illuminating Co.*, *supra*, in that the statute charges the DPU to assure that the utility acts "to achieve the lowest possible overall costs to the customers of the company." G. L. c. 164, § 94G (*a*), lines 70-71. Restricting the inquiry to exclude performance responsibilities delegated to subcontractors clearly would not further that goal.

The company cites two cases, *West Ohio Gas Co.* v. *Public Utils. Comm'n of Ohio*, 294 U.S. 63 (1935), and *Minnesota Power & Light Co.*, 11 FERC par. 61,313 (1981),[8] to support

[8] Minnesota Power & Light Co. (MP&L) contracted with a pollution control company controlled by one of MP&L's directors. When the equipment installed by the contractor did not perform properly, it was abandoned, and MP&L sought approval to pass the consequent loss on to its ratepayers. The approval was denied because "MP&L acted imprudently in the entire matter." 11 FERC par. 61,313, at 61,659, quoting decision of the administrative law judge. The *Minnesota Power* case does not appear to lend support to the company's argument. As we read the decision of FERC, MP&L was found imprudent due to "self-dealing, the selection of a questionable pollution control process, and the failure either (or both) to secure a performance guarantee and to seek damages." 11 FERC par. 61,313, at 61,659.

its contention that the statute does not permit imputation of imprudence.[9] In *West Ohio Gas Co.*, the Supreme Court of the United States found a due process violation in the Ohio Public Utilities Commission's denial of the gas company's claim for an allowance of 9% of gas lost as a result of leakage, condensation, expansion, or contraction. There was no dispute that a certain loss due to these causes were unavoidable no matter how carefully the business was conducted. *Id.* at 67. The Commission had granted only a 7% allowance based on its unproved assertion that any greater loss was wasteful and negligent. 294 U.S. at 68. The Supreme Court held that "[t]he waste or negligence . . . must be established by evidence of one kind or another, either direct or circumstantial." *Id.* We do not believe that *West Ohio* applies here, as the imprudence of Boston Edison was based on substantial evidence, D.P.U. 1009-F, and affirmed on judicial review, *Boston Edison Co. v. Department of Pub. Utils.*, 393 Mass. 244 (1984), and the company was offered an opportunity to participate directly in additional hearings on the issue. D.P.U. 1003-G-3. *West Ohio* does not reach the issue whether the imprudence of Boston Edison properly can be imputed to the company in light of its own statutory responsibilites and contractual arrangements with Boston Edison.

The company makes the argument that the process required by the Legislature includes a formal "finding" by the DPU. It relies on the following language: "[T]he department . . . *shall make a finding* whether the company failed to make all reasonable or prudent efforts consistent with accepted management practices, safety and reliability of electric service and reasonable regional power exchange requirements to achieve the lowest possible overall costs to the customers of the company" (emphasis added). G. L. c. 164, § 94G (*a*), lines 63-71. Such

[9] We are not bound, of course, in our interpretation of Massachusetts law, by decisions of other tribunals, except by decisions of the Supreme Court of the United States relying on the Federal Constitution. *Commonwealth v. Montanez*, 388 Mass. 603, 604 (1983).

a finding was made. D.P.U. 1003-G-6, at 17. ("The Department finds that the Company shares responsibility for BECo's imprudence during the Pilgrim 1 outage.")

The company argues from the text of the statute that the Legislature distinguished "fuel costs" from "costs of purchased power." The statute authorizes inquiry into "the procurement or use of fuel or purchased power included in the fuel charge," G. L. c. 164, § 94G (*a*), lines 65-66 & 71-72, and requires a finding on the utility company's performance in achieving "the lowest possible overall costs . . . for the procurement and use of fuel and purchased power included in the fuel charge," *id.* at lines 70-72, but provides for deduction from the upcoming fuel charge only "the amount of those fuel costs determined by the department to be directly attributable to the unreasonable or imprudent performance." *Id.* at lines 77-79.

The company contends that this distinction is a manifestation of the purpose of the Legislature. By parsing the two elements of the fuel charge, the company urges, the Legislature avoided the preemption question, see *post,* and focussed the enforcement mechanism of the fuel conservation section of the statute on the power-generation performance of the utility, where conservation measures could be effective.

We do not agree that the distinction pressed by the company is meaningful. The Legislature specifically directed the DPU to inquire into, and make a finding on, the prudence of the company's actions in purchasing power. Were we to accept the company's interpretation, the Legislature's direction to the DPU would require a hollow exercise of administrative power for no tangible purpose. Such an interpretation would be "at odds with a workable reading of the entire statute." *American Family Life Assurance Co.* v. *Commissioner of Ins.*, 388 Mass. 468, 473, cert. denied, 464 U.S. 850 (1983). The DPU is repeatedly charged to act on matters connected to fuel charges by language linking costs of fuel and purchased power. The statute is aimed at achieving "the lowest possible *overall* costs . . . for the procurement and use of fuel and purchased power" (emphasis added). G. L. c. 164, § 94G (*a*), lines 70-71. If only costs of fuel used for the company's own generating units

were subject to DPU regulation, the requirements covering purchased power would be meaningless. "None of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute, so that the enactment considered as a whole shall constitute a consistent and harmonious statutory provisions capable of effectuating the presumed intention of the Legislature." *Bolster* v. *Commissioner of Corps. & Taxation,* 319 Mass. 81, 84-85 (1946).

We do not believe that it was the Legislature's intent to require the DPU to pursue investigation, inquiry, and oversight of costs of purchased power, yet deny any meaningful conclusion to that investigation. We reject the company's interpretation and find that the "fuel costs" that may be deducted from the "fuel charge proposed" are the same costs that the Legislature has specified throughout the statute as comprising the "fuel charge," that is, the "costs of fuel to be used in generating or supplying electricity to customers and power purchased for resale to customers." G. L. c. 164, § 94G (*b*), lines 106-108.

3. *Preemption.* The company contends that the DPU has been preempted of jurisdiction to disallow the costs at issue here by the Federal Constitution and Federal statute, and thus that its actions are invalid under the supremacy clause of the United States Constitution. Art. VI, cl. 2. The Supreme Court of the United States has observed that "state law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. . . . If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." (Citations omitted.) *Silkwood* v. *Kerr-McGee Corp.,* 464 U.S. 238, 248 (1984).

In considering a preemption argument, we note that preemption "is not favored, and State laws should be upheld unless a conflict with Federal law is clear." *Attorney Gen.* v. *Travelers*

Ins. Co., 385 Mass. 598, 602 (1982), vacated 463 U.S. 1221 (1983), reaffirmed, 391 Mass. 730 (1984), aff'd sub nom. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 105 S. Ct. 2380 (1985). See *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 132 (1978); *Commonwealth* v. *McHugh*, 326 Mass. 249, 265-266 (1950). The burden is on the party seeking to displace the State action to show preemption with hard evidence of conflict based on the record. *Arthur D. Little, Inc.* v. *Commissioner of Health & Hosps. of Cambridge*, 395 Mass. 535, 545 (1985).

Commonwealth Electric does not contend that Congress has chosen to occupy the field of regulation of electricity sales. Indeed, it could not, as Congress clearly limited the Federal role to regulation of sales of electricity at wholesale, and left regulation of sales at retail to the States. *Batavia* v. *Federal Energy Regulatory Comm'n*, 672 F.2d 64, 68 n.2 (D.C. Cir. 1982). See *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215-216 (1964). Commonwealth Electric might have attempted to show an "actual conflict" in State and Federal regulation due to the physical impossibility of compliance with both State and Federal direction, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963). It did not do so. Its preemption argument thus is based on the contention that the action of the DPU is an obstacle to the realization of the purposes and objectives of Congress in passing the Federal law. See *Silkwood, supra*.

The Federal law involved in this case is the Federal Power Act (FPA).[10] The Supreme Court of the United States discussed the history of the FPA in *Arkansas Elec. Coop.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377-380 (1983), and explained that the purpose of the FPA was to fill the regulatory gap left by the Court's decision in *Public Utils. Comm'n of R.I.* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). *Arkansas Elec. Coop., supra* at 384. See *Jersey Cent. Power & Light Co.* v. *FPC*, 319 U.S. 61, 67-68 & n.7 (1943). As the

[10] Act of June 10, 1920, c. 285, as amended by Title 11 of the Public Utility Act of 1935, 49 Stat. 803, and subsequent amendments (codified at 16 U.S.C. §§ 791a-828c [1982]).

United States Supreme Court has pointed out, Congress was addressing the mischief it perceived latent in the unregulated utility industry when it passed the FPA. "The Act had two primary and related purposes: to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce. 49 Stat. 803-804, 847-848; S. Rep. No. 621, 74th Cong., 1st Sess. 1-4, 17-20; H. R. Rep. No. 1318, 74th Cong., 1st Sess., 3, 7-8; *Jersey Central Co.* v. *FPC*, 319 U.S. 61, 67-68 (1943); see *North American Co.* v. *SEC*, 327 U.S. 686 (1946). The Act was passed in the context of, and in response to, great concentrations of economic and even political power vested in power trusts, and the absence of antitrust enforcement to restrain the growth and practices of public utility holding companies. See S. Rep. No. 621, *supra*, at 11-12; Utility Corporations — Summary Report, 70th Cong., 1st Sess., S. Doc. No. 92, Part 73-A, pp. 47-54; 79 Cong. Rec. 8392 (1935). In order to achieve federal regulation of these and other perceived problems on the operational level of the interstate public utility business, Tit. 11 was enacted. S. Rep. No. 621, *supra*, at 17; H. R. Rep. No. 1318, *supra*, at 7." *Gulf States Utils. Co.* v. *FPC*, 411 U.S. 747, 758 (1973).

Commonwealth Electric argues that because the rates it must pay to its wholesale suppliers are fixed by FERC regulation, oversight by the DPU of the company's costs based on those rates is an obstacle to the realization of the purposes behind the FPA. The company cites our decision in *Eastern Edison Co.* v. *Department of Pub. Utils.*, 388 Mass. 292 (1983), for the proposition that the DPU has no jurisdiction over expenses incurred under an FERC-approved rate.

The company has construed too broadly both the scope of DPU's oversight of rates and our holding in *Eastern Edison*.[11]

[11] Eastern Edison Company (Eastern Edison) purchased power from its wholesale supplier, also its wholly-owned subsidiary, Montaup Electric Company (Montaup). Montaup increased its wholesale rate in order to recoup its investment in the abandoned Pilgrim Nuclear Unit No. 2 project. The wholesale rate was regulated exclusively by FERC. Eastern Edison,

The DPU argues that the Federal regulation of the rates for wholesale transactions is not disturbed by its inquiry into the prudence of a retail seller in choosing the source of its supply and in incurring particular costs. We agree.

The DPU offers a telling analogy to the rates it approves for retail sales to clarify the difference between rate-approval and inquiry into the prudence of incurring costs. "[W]hen the [DPU] sets retail rates, retail customers are faced with a rate that has been found to be just and reasonable, and they must pay that rate if they choose to buy electricity. . . . Decisions to purchase electricity, however, present different questions for each buyer. An industrial customer, for example, may decide that, given available alternatives, the purchase of electricity from the retail company is not reasonable or prudent from his business' point of view. He may choose to use his own power generation equipment or another source of energy, such as oil, natural gas, or coal. He may decide to leave the geographic area altogether. Similarly, a retail electric company may decline to execute a wholesale supply contract upon the discovery of less expensive alternatives. If it chooses to ignore those alternatives and execute the wholesale contract, however, or if it incurs wholesale costs as a result of its imprudence . . . , it may be ruled imprudent notwithstanding the fact that the rate at which it purchased wholesale electricity was approved by FERC."

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in accordance with the provisions of G. L. c. 164, § 94G, sought approval of an increase in its retail fuel adjustment charge to cover the increase in Montaup's wholesale rate. The DPU disallowed recovery of a portion of the costs, and Eastern Edison appealed. We held that the DPU could not review the reasonableness of the wholesale rate, as it was exclusively regulated by FERC. *Eastern Edison, supra* at 302. No question of imprudence was present in *Eastern Edison*, and it is not controlling here. See *Appeal of Sinclair Mach. Prods., Inc.*, 498 A.2d 696, 705 (N.H. 1985).

The company urges that the distinction between review of rates of sale and prudence of purchase is not valid. The cited case of *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 63 N.Y.2d 424 (1984), is inapposite because the State law at issue there purported to fix rates at which utilities were compelled to purchase energy produced by alternate energy producers. It is not disputed here that the approval of wholesale rates is within the Federal domain.

In short, while the DPU cannot inquire into the reasonableness of wholesale rates fixed by FERC, *Eastern Edison, supra,* the DPU may inquire whether a purchaser, such as the company, is warranted in agreeing to purchase at such a rate considering its alternatives. *Appeal of Sinclair Mach. Prods., Inc.,* 498 A.2d 696, 699 (N.H. 1985).

The company has failed to sustain its burden of demonstrating by hard evidence how the action of the DPU will frustrate the full purposes and objectives of Congress in enacting the FPA. We conclude that the DPU was not preempted from the action it took in this case.

The company makes three additional related arguments: first, that the DPU is attacking collaterally (and therefore impermissibly) the FERC administrative decision to approve the company's contracts with its wholesale suppliers; second, that the DPU action is prohibited by the commerce clause of the Constitution of the United States, art. I, § 8, cl. 3; and third, that the disallowance of recovery of incurred costs constitutes a confiscation of property without due process of law. We address each of these arguments briefly.

a. *Collateral attack on an administrative decision.* The company contends that the DPU — by refusing to allow the cost recovery — is attempting to circumvent the FERC administrative procedures for rate approval and the provisions for judicial review of that approval, see 16 U.S.C. § 825l (1982), by collaterally attacking the approved rate. Cf. *Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 339-341 (1958) (State could not raise in later proceeding between same parties issue that should have been raised in review of FPC [predecessor to FERC] decision); *Commonwealth of Massachusetts, Dep't of Pub. Utils.* v. *United States,* 729 F.2d 886, 886 (1st Cir. 1984) (State cannot order utility to seek FERC approval of State-proposed change in utility's FERC-regulated rates and practices but must itself follow statutory procedure by filing complaint seeking FERC action). This argument would have merit if we were convinced that the issue is one over which FERC has jurisdiction. As stated above, we do not agree with that contention. Because FERC does not have jurisdiction over retail rates,

the issue raised here could not, and should not, have been raised in an FERC rate-approval proceeding or a review of an FERC decision. Thus, the "attack" is not precluded under the *Tacoma* rationale.

b. *The commerce clause*. The company suggests that the action of DPU violates the commerce clause of the Constitution of the United States, art. I, § 8, cl. 3. The company cites three factors demonstrating the unconstitutional burdens allegedly imposed by the DPU action: the benefit of an "added level of review of prudence of power supply costs" would not outweigh the burdens of uncertainty of the finality of FERC approval; possible disparate State-by-State treatment, and discouragement of long-term contracts.

"Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co.* v. *Detroit,* 362 U.S. 440, 443 [1960]. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 [1945], but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens. See, *e.g., Shafer* v. *Farmers Grain Co.,* [268 U.S. 189 (1925)]." *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). See *Commonwealth* v. *B & W Transp. Inc.,* 388 Mass. 799, 808, appeal dismissed sub nom. *Burke Distrib. Corp.* v. *Massachusetts,* 464 U.S. 957 (1983); *Grocery Mfrs. of Am., Inc.* v. *Department of Pub. Health,* 379 Mass. 70, 80-81 (1979).

The company's description of the benefit of State regulation — an "added level of review of prudence of power supply

costs" — is inaccurate. The DPU review of the prudence of retail utilities is not "added"; the DPU is the agency charged with that function, and the jurisdiction of FERC is expressly limited to exclude that function. See 16 U.S.C. §§ 824(a), (b)(1) (1982); *Batavia* v. *FERC*, 672 F.2d 64 (D.C. Cir. 1982); *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205 (1964). The speculative burdens supposed by the company are not established in the record and certainly are not "clearly excessive." *Pike, supra*. There has been no showing that the DPU action violates the commerce clause.

c. *Confiscation without due process*. The company argues that it has been deprived of its property without due process of law.[12] As we understand it, this claim arises because, according to the company, there was "an absence of any finding of [the company's] imprudence."

In considering a due process claim, we examine first whether the claimant has been deprived of "property," and, if so, we consider what process is due. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 570-571 (1972). The company's brief does not show that it has been deprived of "property." We do not proceed any further.[13]

4. *Summary*. The Department of Public Utilities did not err in imputing to Commonwealth Electric Company the impru-

[12] The company's brief does not cite the constitutional provisions on which it relies for this argument. The due process argument is a section of the company's argument that the DPU action is a Federal constitutional violation, however, and we presume that the company bases its claim on the Fourteenth Amendment to the United States Constitution. We express no opinion on any due process claims which might be based on the Constitution of the Commonwealth.

[13] Even if we were to conclude that the company's opportunity to recover the costs of providing service is "property," we would have difficulty in finding that the company was due any process it did not receive. The company was permitted to participate in an extensive formal hearing to establish the facts upon which the DPU's decision was based, and presented its arguments before the decision maker. The company seems to be arguing under due process guise for a different substantive standard of decision. Their due process argument is in essence a restatement of their complaint that imprudence was improperly imputed to them. We have considered that argument above, and we have rejected it.

dence of Boston Edison Company. Nor did the DPU exceed its statutory authority granted by the Legislature. The Federal Constitution and the FPA do not prohibit the regulatory action taken by the DPU. Therefore, the relief sought by Commonwealth Electric Company is denied, and a judgment is to enter in the county court affirming the orders of the DPU.

So ordered.

LYNCH, J. (dissenting). The Federal Power Act extends the scope of Federal regulatory jurisdiction "to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824 (b) (1) (1982). However, Congress did not limit jurisdiction to *sellers* at wholesale, but rather conferred jurisdiction over wholesale transactions. See, e.g., *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n*, 332 U.S. 507, 516-518 & nn.13, 14 (1947); *Appeal of Sinclair Mach. Prods., Inc.*, 498 A.2d 696, 701 (N.H. 1985).

Because Congress evidenced "an intent to occupy" the field of wholesale transactions, inquiries relating to the prudence of such transactions (whether focusing upon buyer or seller) would be preempted, *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-204 (1983), were it not for the fact that Congress has given FERC the power to leave areas of its jurisdiction[1] to the States. *Arkansas Elec. Coop.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 383-385 (1983). FERC has unequivocally adopted the policy that issues of purchaser prudence are best left to the States, and has repeatedly withheld the assertion of jurisdiction over such questions. *Consolidated Gas Co. of Fla., Inc.* v.

[1] Of course, FERC cannot delegate its jurisdiction to regulate in violation of the Federal Power Act nor, apart from that act, can States be given the power to regulate in violation of the commerce clause's "implied limitation on the power of the States to interfere with or impose burdens on interstate commerce." *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 652 (1981). See *Arkansas Elec. Coop.* v. *Arkansas Public Serv. Comm'n*, 461 U.S. 375, 389 (1983).

Florida Gas Transmission Co., 28 FERC par. 61,350 (1984). *Southern Co. Servs., Inc.* 26 FERC par. 61,360 at 61,795 (1984). *Pennsylvania Power and Light Co.*, 23 FERC par. 61,006 at 61,019 (1983). *Philadelphia Elec. Co.*, 15 FERC par. 61,264 at 61,601 (1981). Compare *Eastern Edison Co. v. Department of Pub. Utils.*, 388 Mass. 292 (1983). FERC's decision to leave purchaser prudence issues to the respective State commissions is predicated on the fact that the Federal Power Act only empowers FERC to review wholesale transactions for justness and reasonableness: a just and reasonable purchase may not be optimal.[2] However, FERC could choose to review wholesale purchases for justness and reasonableness and preclude further State review of the wholesale transaction on any ground.

It follows therefore that State review of purchaser prudence is limited. "[M]atters actually determined, whether expressly or impliedly, by the FERC" are clearly preempted. *Appeal of Sinclair Mach. Prods., Inc., supra* at 704. *Eastern Edison Co. v. Department of Pub. Utils., supra* at 298-302. Even when FERC has chosen to leave purchaser prudence inquiries to the States, it has limited those inquiries. In *Pennsylvania Power and Light Co., supra* at 61,019, FERC stated:

> "However, we note that power supply arrangements are often negotiated on a long-term basis. It requires many years to build a generating plant and the building utility must be able to rely on long-term sales contracts in making its own capacity plans just as the purchasing utility must be able to rely on long-term contracts for stability of supply. Demand forecasts may change dramatically and

[2] Thus, *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 77 Pa. Commw. 268, 273 (1983), and *Spence v. Smyth*, 686 P.2d 597 (Wyo. 1984), which hold that FERC has no power under the Federal Power Act to preempt State purchaser prudence inquiries are plainly wrong. *Appeal of Sinclair Mach. Prods., Inc.* 498 A.2d 696, 703-704 (N.H. 1985), in citing both of those cases was careful not to rule out categorically the assertion of FERC jurisdiction, and articulated the rule that preemption only extends automatically to "those matters *actually determined*, whether expressly or impliedly, by the FERC" (emphasis in original).

> quickly, as we have seen in recent years. The prudence of a sales arrangement, therefore, should be judged on the circumstances prevailing at the time such a contract is entered into. If a State commission, this Commission, or a utility itself could release a party to a contract from its contractual commitments simply because the contract, based on hindsight and demand forecasts in later years, no longer appears economical, the utility industry would have no supply stability or reliable basis for constructing plant. We therefore suggest that evaluation of the prudence of a 1979 power contract on the basis of 1982 demand forecasts is neither fair nor appropriate. Thus, while we commend the New Jersey Board for its concern in protecting the ratepayers within its jurisdiction, we do not believe that this protection can be at the expense of Pennsylvania ratepayers and utilities. The latter are entitled to rely on the fact that New Jersey utilities will honor their contractual commitments to purchase capacity built at least partly to fulfill their contractual demand."

Thus, FERC has made it clear that the prudence of entering a wholesale purchase contract at a particular purchase price level should be judged, not on hindsight but rather from the point of view of the time of the contract. Similarly, the prudence of entering into such a contract with particular provisions allocating operating/service responsibilities and risk of supply failure should not be judged on hindsight.

The majority, I submit, errs in two ways. First, it was incumbent on the DPU to review the FERC order[1] approving the agreement (F.P.C. Docket No. E-8138) to insure that FERC had not expressly or impliedly determined that the agreement was just and reasonable from the point of view of Commonwealth Electric. Because the DPU order, D.P.U. 1003-G-6, *supra*, did not consider that FERC order at all, the case should be remanded for consideration of that order. Second, the DPU held Commonwealth Electric imputedly liable for the subsequent

[1] That order is not in the record.

imprudent acts of Boston Edison based on the policy, which the majority recognizes, *ante* at 368-369, that the form of the contract should not allow a company to limit its responsibility for providing service at the lowest possible cost since that would create "an untoward incentive for utilities to establish ownership forms that exempt them from liability." D.P.U. 1003-G-6, *supra* at 18 n.1. A categorical policy that accepting a contract which places the cost of the risk of supply failure on the ratepayers is imprudent ignores the myriad of factors which may or may not make entering such a bargain a prudent alternative at the time it is entered into. The DPU order does not consider the then available alternatives, in light of the purchase price, and therefore does not provide sufficient factual support for the conclusion that Commonwealth Electric was imprudent at the time it entered into the contract. The DPU order does not demonstrate, as it must, that that categorical policy, as applied in this case, did not introduce an element of impermissible hindsight. I therefore dissent. I would not reach the other objections raised by the plaintiff. I would remand the case to the DPU for action consistent with these two preemption precepts.

Appendix "B"

The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

September 22, 1982

D.P.U. 1003-G-6

Application of Commonwealth Electric Company for approval by the Department of Public Utilities of a quarterly adjustment to the Company's fuel charge, under the provisions of G.L. c. 164, § 94G, as amended by Chapter 375 of the Acts of 1981, commencing with meter readings in the billing month of July 1982. The charges are to apply to all customers of the Company whose electric service is subject to the jurisdiction of the Department.

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FOR: DEPARTMENT OF THE ATTORNEY GENERAL *Intervenor*

I. INTRODUCTION

On June 11, 1982, the Department of Public Utilities ("Department") issued an Order, D.P.U. 1003-G-1, which stated that the Department would determine in this docket whether the Commonwealth Electric Company ("ComElectric" or "Company"), as a holder of a contract for power from Boston Edison Company's ("BECo") Pilgrim 1 nuclear unit, should be held liable for replacement power costs incurred as a result of imprudent practices of BECo at the Pilgrim unit (see *Boston Edison Company*, D.P.U. 1009-F (1982) and D.P.U. 1009-G (1982).

On June 24, 1982, a hearing was held in the offices of the Department concerning the Company's July to September 1982 fuel charge. The Company presented two witnesses, J. James Tasillo, Jr., Vice-President, Rates, of ComElectric, and S. Robert Fox, Director of Systems Planning of Commonwealth Energy System.

On July 2, 1982, the Department issued an Order, D.P.U. 1003-G-2, which set a quarterly fuel charge for the Company of $.05757 per kilowatthour ("KWH") subject to refund of (1) the replacement power costs incurred by the Company due to imprudent practices of BECo relating to the September 1981 through April 1982 outage at Pilgrim 1, and (2) the abandonment costs agreed to by the Company relating to the abandonment by New England Power Company in December 1979 of the two nuclear units ("NEP units") proposed for a site in Charlestown, Rhode Island. The Department, pursuant to G.L. c. 164, § 94G(a), continued its investigation into these two areas for ninety days.

Several additional hearings were held subsequent to July 2. The Company has moved five exhibits into evidence, designated C-1 through C-5. The Attorney General has moved into evidence eight exhibits, designated AG-1 through AG-8. The

Bench has moved into evidence five exhibits, designated HO-1 through HO-5. In addition to these exhibits a number of other exhibits were incorporated by reference into evidence. These were: (1) two exhibits, CE-2B and CE-2C, from D.P.U. 1032 (the application of the Company for an annual performance program relating to fuel procurement and use); (2) the Company's annual return for 1981; (3) the record in D.P.U. 1003-F, the Company's application, *inter alia*, for an April through June 1982 fuel charge; and (4) the entire record in D.P.U. 1002-G, the Cambridge Electric Light Company fuel charge docket.

II. ISSUES

A. The Pilgrim I Issue

On December 7, 1981, the Pilgrim I nuclear unit began an unscheduled outage that was to last until April 8, 1982 (the unit had been in a scheduled outage status from September 26 through December 6, 1981). The Pilgrim unit is operated by BECo. In *Boston Edison Company*, D.P.U. 1009-F, the Department conducted an extensive investigation into the portion of the outage that occurred between December 1, 1981, and February 28, 1982, and determined that in certain respects BECo had been imprudent in its conduct. In *Boston Edison Company*, D.P.U. 1009-G, the Department conducted an extensive investigation into the portion of the outage that occurred between March 1 and April 8, 1982, and concluded that BECo had *not* been imprudent in its conduct. Pursuant to G.L. c. 164, § 94G, the Department precluded BECo from recovering those costs which were attributable to the imprudent conduct found in D.P.U. 1009-F.

Since the initial operation of Pilgrim 1, the Company has had a contract with BECo under which BECo sells to the Company 11 percent of Pilgrim's capacity and the energy corresponding thereto (the agreement was signed by BECo and the New Bedford Gas and Edison Light Company, predecessor to the Company). This contract (see Exh. C-3, Schedule 6), was agreed to by the parties on August 1, 1972, and is to run for at least 28 years from the initial date of commercial operation of the unit. (Contract provisions allow for extensions of the 28-year term.) One of the Company's witnesses has termed this contract a life-of-the-unit contract (Tr. II, pp. 31 *et seq.*).

When the Pilgrim I unit is experiencing an unscheduled outage, the Company must seek replacement power from other sources. These other sources are almost always more expensive than the cost of power received from Pilgrim 1, due to various factors. The difference between the cost of Pilgrim 1 power (or Pilgrim 1 scheduled outage service) and replacement power service has been quantified by the Company (at the request of the Department) for periods that correspond to those periods in which BECo was found to be imprudent in D.P.U. 1009-F and 1009-G. The replacement power costs, as submitted by the Company (Exh. HO-3, HO-4, C-3, Schedule 9-B) and verified by the parties based on the Company's submittal are: $105,282 for December 7, 1981 through January 18, 1982, the initial period in which BECo was found to be imprudent, and $446,971 for March 31 through April 7, 1982, the second period in which BECo was found to be imprudent. The total replacement power cost for the two periods is $552,513.

The issue before the Department is whether the Company's shareholders should bear the cost of the imprudence at the Pilgrim 1 unit or whether the customers of the Company should be required to bear the imprudently incurred costs in the form of higher electric bills.

B. The NEP units

In 1976, the Canal Electric Company ("Canal"), an affiliate of ComElectric) and other companies entered into an agreement (Exh. C-3, Schedule 2) with the New England Power Company ("NEP") to construct two nuclear electric generating units in Charlestown, Rhode Island, or at an alternative site. Under this contract, NEP was to be the lead owner of the units. Beset by difficulties, however, NEP cancelled the project in December 1979. In September 1980, the Company signed an agreement with Canal. This agreement, termed a Capacity Acquisition Agreement ("CAA"), set forth Canal's duties as a producer and supplier of power and the Company's obligation to purchase this power. Section 4 of the CAA obligates the Company to pay to Canal any abandonment costs incurred by Canal as a result of its efforts to fulfill a Capacity Acquisition Commitment ("CAC"). The CAA was subsequently filed with the Federal Energy Regulatory Commission ("FERC") in September 1980 along with CAC's for the NEP units and the proposed Seabrook, New Hampshire nuclear units. In December 1980, Canal began billing the Company for a share of its costs attributable to the NEP units abandonment, amortized over a three-year period; since December 1980 the Company has paid each monthly bill from Canal. The Company wishes to charge its customers approximately $1,354,000 in costs related to the abandonment (Exh. HO-1). The issue before the Department is whether the recovery of the NEP unit costs from the Company's ratepayers is proper under the circumstances.

III. THE PARTIES' ARGUMENTS

A. The Pilgrim 1 Issue

1. The Company's Contentions

The Company states in its supplemental brief (the initial brief dealt solely with the NEP units abandonment issue) that it has properly discharged its burden of proof with respect to the Pilgrim 1 issue. The Company argues that it has shown that it had no ownership or operational responsibilities at the Pilgrim 1 unit under the contract the Company held with BECo (Company's Supplemental Brief, p. 13). The Company also asks the Department to take into account the constraints that characterize minor participants in a generating unit; constraints that are called "generally salutary and economical" (Company's Supplemental Brief, p. 14). The Company also has pointed to a contract provision that extends the contract's expiration date when any Pilgrim 1 outages exceed 120 days in duration. This provision would extend the Company's contract past the December 2000 expiration date, according to the Company, and has great value to the Company's customers (although its precise value is difficult to quantify at this time) (Company's Supplemental Brief, p. 24).

The Pilgrim 1 unit is only one source of power for ComElectric, which fact suggests that the Department consider the diversity of power sources in judging the prudence of the Company. The standard, according to the Company, "should be one of reasonableness and prudence given the necessity and desirability of unit sales and similar commitments and the constraints on oversight and operational involvement which necessarily are entailed" (Company's Supplemental Brief, p. 19). The Company also claims that since the basis for considering the conduct of the Company derives from the findings in D.P.U. 1009-F and 1009-G, the Department can take into

account only the period December 7, 1981, through January 18, 1982 (a small portion of the unscheduled outage at Pilgrim 1) (Company's Supplemental Brief, p. 17). This claim is not elucidated.

The Company argues that its power contract with BECo, as a FERC-regulated rate schedule, must be "conclusively presumed to be fair and reasonable" under established law (Company's Supplemental Brief, p. 21). In addition, the Company's position is that all the purchases of replacement power during the Pilgrim 1 outage were made pursuant to FERC-regulated rates and a "state cannot circumvent federal regulation of wholesale electric rates by disallowing them as costs of service in state proceedings setting retail rates. . ." (Company's Supplemental Brief, p. 20).

A final issue addressed by the Company is whether the imprudence of BECo can be imputed to it. The Company does note that in *Commonwealth Electric Company*, D.P.U. 956 (1982), the Department imputed to the Company the imprudence of BECo in failing to cancel the proposed Pilgrim 2 unit in a timely fashion. The Company was a part owner in the Pilgrim 2 unit. ComElectric differentiates the Pilgrim 2 situation by stating that it is only a purchaser of power at Pilgrim 1, and that the timing of a unit cancellation is different from problems associated with a plant maintenance outage on the facts involved, including the existence of "expert regional maintenance planning and scheduling" organizations (Company's Supplemental Brief, p. 17). The Company takes exception with an automatic imputation of negligence as a violation of the Due Process Clause of the United States Constitution. The Department's reliance on D.P.U. 1009-F and 1009-G does not cure this defect, the Company avers, "because of the insufferable burden it would place on the Company to relitigate, in effect, another company's case of very substantial complexity" and because of the very different roles BECo and ComElec-

tric have with respect to Pilgrim 1 (Company's Supplemental Brief, pp. 22-23).

The analogy ComElectric sees with respect to its involvement in the Pilgrim 1 outage is that of an entity that has engaged an independent contractor to perform services. In this case, BECo is the independent contractor with the "requisite expertise and authority" (Company's Supplemental Brief, p. 25), and this contracting out was made in accordance with industry standards.

2. The Attorney General's Contentions

The Attorney General takes a different view of the Company's burden of proof in this adjudicatory proceeding. The Attorney General agrees that the Company has the burden of proof but argues that neither the Department nor any intervenor need present any evidence contrary to that offered by the Company.

The Attoney General contends that ComElectric is liable for the costs attributable to the imprudence during the unscheduled outage at the Pilgrim 1 unit under two theories. First, the Attorney General argues that the Company has acted imprudently in overseeing Boston Edison's conduct at the Pilgrim 1 unit. Aside from the issue of whether the Company's agreement with BECo is reasonable and prudent, the Company has various rights under the agreement relating to the Pilgrim 1 unit. In general, the Company has the right to consult with BECo and the right to information on the unit's operation and maintenance. According to the Attorney General, the Company has failed to use all reasonable and prudent efforts to procure the lowest fuel costs, pursuant to G.L. c. 164, § 94G, because it relied almost entirely on routine NEPOOL communications (Attorney General's Initial Brief, p. 9). This lack of communi-

cation occurred in the context of BECo's never having "completed work on Pilgrim 1 within the time scheduled for *any* previous outage since the unit's in-service date" (Attorney General's Initial Brief, p. 10). The Attorney General maintains that ComElectric violated its statutory duty by not reviewing BECo's activities more closely and exercising its right to Pilgrim 1 information. Had the Company exercised proper diligence, the Attorney General argues, BECo might have been led "to re-evaluate its own scheduling procedures and request more outage time for the Pilgrim 1 unit" (Attorney General's Initial Brief, p. 11), thus affecting the Company's replacement power costs.

Second, the Attorney General argues that BECo's imprudent conduct may be imputed to the Company on the theory that BECo acted on the Company's behalf. The Attorney General states that a utility has a responsibility to provide its customers with the lowest possible fuel cost; the utility may enlist the aid to another company to assist it in supplying its customers, but the utility retains the responsibility for providing its customers with the lowest possible fuel cost and thus is liable for the negligent acts of its delegate (Attorney General's Initial Brief, pp. 16 *et seq.*). In *Boston Edison Company*, D.P.U. 1009-F (1982), and D.P.U. 1009-G (1982), the Department did find BECo to be imprudent with respect to portions of the unscheduled outage occuring at the Pilgrim 1 unit and penalized BECo for this imprudence.

According to the Attorney General, the life-of-the-unit agreement between BECo and the ComElectric should not insulate the Company with the proper standard of care. Furthermore, the Attorney General contends the life-of-the-unit contract imposes the same repsonsibilities on the Company as would joint ownership. The Attorney General states that there have been three methods of selling the power from nuclear units:

(1) A group of utilities finance a company which builds and operates a nuclear unit and each utility owns a portion of the company and is entitled to the same portion of the capacity and energy of the unit. This is commonly called an entitlement form of organization.

(2) A group of utilities finances a unit with the lead participant operating the unit. This is commonly called a joint ownership arrangement.

(3) One utility finances and operates a unit but sells a percentage of the unit's ouput to a utility that pays this percentage of unit costs, including operation and maintenance expenses, taxes and capital costs. This is commonly called a life-of-the-unit contract (Attorney General's Initial Brief, p. 13).

Insofar as a company's customers are concerned, states the Attorney General, there is no difference in the financing option chosen once the unit is on line. The Attorney General also cites from ComElectric's agreement with BECo to show that the risks the Company assumed are the same as those of a joint owner of a unit (Attorney General's Initial Brief, p. 15). The Attorney General cites *Commonwealth Electric Company*, D.P.U. 956 (1982), for the proposition that the imprudence of one utility can be imputed to another.

Aside from legal considerations in support of an imputation of imprudence, the Attorney General states that there are sound public policy grounds for such a finding. He contends that: (1) there should be a uniform treatment for companies involved in the same project; (2) allowing the form of the contract to control will encourage all companies to write contracts exempting themselves from liability; and (3) an imputed liability theory will create an incentive for companies to exercise fully their contract rights.

In addition to the two theories of liability advanced, the Attorney General asserts that the Company has a breach of contract action against BECo and the Company should exercise

this remedy before requesting reimbursement from its ratepayers.

B. The NEP units

1. The Company's Contentions

The Company's basic argument is that this is a rate matter under exclusive federal jurisdiction and that a valid rate has been filed with and accepted by the appropriate federal agency, FERC. Therefore, Article VI of the United States Constitution, the Supremacy Clause, requires that the Department, a state agency, accept the filed rate. In its supplemental brief, the Company reiterates its basic argument and adds that, pursuant to the CAA and the CAC, Canal billed the Company and the Company thereafter began making payments to Canal. The Company contends that no "further supplements, schedules, rates or documents were filed by Canal in connection with its billings, because none were required" (Supplemental Brief, p. 6, citing Tr. IV, p. 44).

2. The Attorney General's Contentions

The Attorney General has made four arguments with respect to the pass-through of the NEP abandonment costs from Canal to the customers of the Company. First, the Attorney General argues that the tariff or rate filed with FERC does not permit Canal to bill, or the Company to collect, the charges claimed. The Attorney General does not argue that Canal has no FERC tariff; he agrees that the CAA is such a tariff. Nor does the Attorney General contend that "the lack of a specific dollar charge per unit of electricity prevents the CAA from acting as

a filed tariff" (Attorney General's Initial Brief, p. 25); a tariff that sets forth a formula for recovery may be acceptable. Rather, the Attorney General argues that in this instance there is nothing in the filed tariff that indicates what rate treatment the Company is subject to. The Attorney General believes that the language in the CAA that allows Canal to recover costs "in a manner agreeable to Canal and its purchasers" indicates that a further agreement would be negotiated between the parties and filed with FERC. Absent that further agreement, there is no federally-mandated rate to pass through, and therefore the Department would not be contravening any precepts of the federal system by acting to disallow the charges the Company asks to pass through to its ratepayers.

Second, the Attorney General claims that recovery for the NEP units abandonment, if allowed, can be no more than the $883,000 shown as Canal's "net loss on cancellation" in the CAA, Schedule C (Exh. C-3, Schedule 3) (Attorney General's Memorandum, p. 4). This, claims the Attorney General, is the only figure that might indicate a total for recovery in the documents filed with FERC.

Third, the Attorney General argues that if the Company is allowed to recover the NEP unit costs, it should recover them on an amortized three-year basis beginning in July 1982, and not beginning in December 1980. The Attorney General avers it would be inequitable to allow the Company to charge the costs in July 1982 for the period from December 1980 to July 1982 since it was the Company which failed to seek proper accounting instructions from the Department (Attorney General's Memorandum, p. 6).

Finally, the Attorney General contends that the Company signed the CAA and CAC with Canal after the NEP units had been cancelled and no utility exercising reasonable business judgment would oblige itself to pay for a project cancelled nine months earlier (Attorney General's Memorandum, p. 6).

In the Attorney General's view, the Company simply aims to make its customers pay for a business loss previously incurred by its affiliate, Canal, and this is unreasonable.

IV. FINDINGS

1. In *Boston Edison Company*, D.P U. 1009-F (1982) and D.P.U. 1009-G (1982), the Department found that BECo had acted imprudently with regard to certain aspects of the Pilgrim 1 outage which extended from September 26, 1981, through April 8, 1982. The Department held that BECo failed to make all reasonable or prudent efforts to achieve the lowest possible overall costs for its customers for the procurement and use of fuel and purchased power when it failed to request in a timely manner additional scheduled outage time and when it failed to address in a timely manner whether certain of Pilgrim's blockwalls were within the scope of the outage work required by the Nuclear Regulatory Commission ("NRC") (D.P.U. 1009-F, p. 68).

The cost associated with the failure to request additional scheduled outage time was found to be the difference between the cost of replacing Pilgrim 1 power with scheduled outage service ("SOS") and the actual replacement power costs for the period December 7, 1981, through January 18, 1982 (D.P.U. 1009-F-2, p. 14, D.P.U. 1009-G, p. 56-57). The cost associated with the failure to address whether certain blockwalls were within the scope of work required by the NRC was found to be the difference between the cost of power if it had been generated by Pilgrim 1 and the actual replacement power costs for the period March 31 through April 7, 1982 (D.P.U. 1009-G, p. 56-61).

2. The Department finds that the Company has, under its life-of-the-unit contract, all the responsibilities and benefits

of a joint owner in the Pilgrim 1 unit. Although the Company does not have an ownership share in the Pilgrim 1 unit, its life-of-the-unit contract is in all relevant respects here the same as partial ownership. Several sections of the contract give the Company rights and place responsibilities on the Company consistent with partial ownership. Section 3.2 of the contract gives the Company consultation rights on modification of or additions to the unit (Exh. C-3, Schedule 6). Section 8.1 of the contract (*Id.*) indicates that the Company has assumed the risks of ownership in the following language:

> [i]t is the intent of this Paragraph that Buyer share with seller any risk falling on seller and arising pursuant to this Agreement to the extent of eleven percent (11%), and in such a manner that the risk of loss falling on Buyer is identical to such risk as would befall a complete owner of eleven percent (11%) of the Unit.

The following language again specifies the extent to which the Company's commitment simulates ownership, including the obligation to "pay-off" the unrecovered plant costs if the unit is prematurely shut-down:

> [i]f this Agreement is cancelled pursuant to Paragraph 6.1(c) [shutdown and permanent retirement of the unit] due to conditions other than damage to the Unit, Buyer agrees to reimburse Seller for eleven percent (11%) of the Unrecovered Plant Value of the Unit less recoverable salvage value (Section 9.2 of the contract (*Id.*).

Section C-1.1 of the contract (*Id.*) provides

> [i]t is the intent of the parties that during the term of the Agreement, Buyer shall reimburse Seller during the term

of the Agreement as provided herein for eleven percent (11%) of all costs incurred by Seller by virtue of: (1) the construction of, or any modification or additions to the Unit, and (2) the operation of or maintenance to the Unit.

Section A-3.1 of the contract (*Id.*) provides that

> . . . .seller does not guarantee a constant supply of such electricity and shall be excused from delivering the electricity hereunder and not be considered to be in default if and to the extent that it shall be prevented from so doing by action of a court or public authority or by reason of shutdown of the Unit due to breakdown, scheduled or unscheduled repairs or maintenance, storm. . . The intent of this provision is that Buyer shall assume the risks on non-delivery of electricity hereunder caused by the hazards of the business to the same extent as if it were itself operating the Seller's Unit for the purpose of supplying itself with electricity. . . .

We determine that in this instance the Company's life-of-the-unit contract creates the obligations and privileges of a joint owner in Pilgrim 1 and shall treat the two arrangements the same for the purpose of determining the Company's responsibilities under G.L. c. 164, § 94G.

3. The Department finds that the Company shares responsibility for BECo's imprudence during the Pilgrim 1 outage. Pursuant to its life-of-the-unit contract, ComElectric was not relieved of its service responsiblities, which include providing electricity at the lowest possible fuel cost; therefore, we believe that the Company is imputedly liable under G.L. c. 164, § 94G, for BECo's imprudence and that under that statute the Company's ratepayers should not pay the costs associated with the

imprudent practices during the Pilgrim 1 outage. The Department has previously imputed the imprudence to BECo to the Company in *Commonwealth Electric Company,* D.P.U. 956 (1982), involving the cancellation of the Pilgrim 2 nuclear unit. That case, while presenting a different fact pattern, involved the same legal question as presented here.[1]

4. Based on the contract between BECo and the Company and the record in this case, we find it is unnecessary to reach the question of whether the Company was imprudent under G.L. c. 164, § 94G, as a result of its own actions.

5. The Department finds that the contract provision in the BECo agreement that extended the agreement's expiration date when any Pilgrim 1 outage exceeds 120 days does not absolve the Company of the imprudence imputed to it above. Such a clause could possibly mitigate damages, but the Department does not find that this particular contract extension, almost twenty years in the future, mitigates damages in this case. Such a contract extension would benefit a group of ratepayers substantially different from the present group. The present value of the benefit is tremendously speculative, based as it is upon assumptions of oil prices and generation mix twenty

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[1] In making this finding we are mindful of the desirability of certain life-of-the-unit contracts and the constraints on oversight and operational involvement which power contract place on a utility. In this instance, however, the Company ratepayers should not have to bear the imprudently incurred costs while BECo's customers avoided such costs.
Important public policy considerations argue for the result we reach. We agree with the Attorney General that to the greatest extent possible there should be uniform treatment of companies involved in the same project, and that allowing the form of the contract to control a company's responsibility for providing service at the lowest possible cost would create an untoward incentive for utilities to establish ownership forms that exempt them from liability.

years hence, and on the assumption that the unit will be operating past the year 2000.

6. The Department rejects the Company's argument that it cannot be imputed to be imprudent because its relationship to BECo is one of employer to independent contractor and in D.P.U. 1009-G the Department refused to impute imprudence of an independent contractor to BECo. We do not believe that the independent contractor analogy that the Company has drawn is valid. Even if it were, however, the Company has based its argument on a misreading of the Department's decision in D.P.U. 1009-G. In that docket we refused to impute liability for actions taken by an independent contractor where the contractor was working in areas in which BECo had no or little expertise.

7. The Department finds that the existence of the contract with BECo as a FERC filed-rate does not remove the question of the Company's imprudence from our jurisdiction. The Department has conducted an investigation concerning the operation of the Pilgrim 1 outage and found BECo imprudent. In this Order the Department has found, based on the Company's contract and the record in this case, that the Company shares responsibility for the imprudence because it was not relieved of its service responsibilities.

In addition, G.L. c. 164, § 94G, requires the Department to examine fuel charges to a utility's retail customers and determmine if they were prudently incurred. We find this statute was intended to operate consistently for all electric utilities the Department regulates, and, thus, our investigation applies to ComElectric's fuel charge to the same extent it applies to BECo's.

We also find that the filing of replacement power costs with FERC does not bar our inquiry. It is not the level of replacement

power cost rates that the Department takes issue with, it is the need for the Company to rely on replacement power costs at all. In no sense is the Department taking issue with the setting or existence of these replacement power rates.

8. We have found the Company imputedly liable for BECo's imprudence. The measure of damages is the difference in costs between replacement power costs and the power costs had BECo not been imprudent. These costs, calculated as shown in Tables 1, 2 and 3 on the following pages, we find to be $552,513 in total, excluding interest.

Table 1

December 7, 1981, through December 31, 1981[2]

1. Actual Costs of Pilgrim Replacement Power

Power	MWH	Cost
a. Gas Turbine	808	$ 88,880
b. Diesels	468	44,577
c. Cannon 1	1,916	111,837
d. Cannon 2	1,967	115,797
e. Wyman 4	342	17,955
f. Canal 2	33,899	1,403,758
TOTAL	39,400	$1,782,804

2. Replacement of Pilgrim Power with SOS

Power	MWH	Cost
a. Cannon 1	934	$ 54,517[3]
b. Cannon 2	86	1,530
c. Wyman 4	342	17,955
d. SOS	4,171	203,837
e. Canal 2	33,867	1,402,433
TOTAL	39,400	$1,680,272

3. Difference between actual replacement power costs and costs that would have been incurred with SOS: $102,532.

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[2] From Exhibit C-3, schedule 9-B, p. 1 of 3.

[3] Based upon an SOS cost of $44.87/MWH ($4.30/MWH for Pilgrim plus a Nepex loader for the month of $44.57).

Table 2

January 1, 1982, through January 18, 1982[4]

1. Actual Costs of Pilgrim Replacement Power

Power	MWH	Cost
a. HELCO Gas Turbine Purchase	3	$ 318
b. Diesels	139	13,239
c. Cannon 1	878	50,704
d. Cannon 2	860	50,095
e. Wyman 4	427	22,021
f. Canal 2	25,755	1,018,095
TOTAL	28,062	$1,154,472

2. Replacement Power Costs with SOS

Power	MWH	Cost
a. HELCO Gas Turbine Purchase	1	$ 106
b. Diesels	71	6,762
c. Cannon 1	878	50,704
d. Cannon 2	647	37,688
e. Wyman 4	427	22,021
f. SOS	283	16,086[5]
g. Canal 2	25,755	1,018,095
	28,062	$1,151,462

3. Difference between actual replacement power costs and costs that would have been incurred with SOS; $3,010.

[4] From Exhibit HO-4.

[5] Based on an SOS cost of $56.84/MWH ($4.30/MWH for Pilgrim plus a Nepex loader for the month of $52.54/MWH).

Table 3

March 31, 1982, through April 7, 1982[6]

1. Actual Costs of Pilgrim Replacement Power

Power	MWH	Cost
a. Diesels	50	$ 4,523
b. SOS	1,636	120,058
c. Cannon 2	2,895	157,633
d. Wyman 4	932	44,727
e. Canal 2	4,855	168,760
TOTAL	10,368	$495,701

2. Cost of Power if Generated by Pilgrim[7]

Power	MWH	Cost
a. Pilgrim	10,368	$ 48,730[8]
TOTAL	10,368	$ 48,730

3. Difference between actual costs and costs that would have been incurred with Pilgrim on-line: $446,971.

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[6] From Exhibit HO-3.

[7] Assuming a 73.7 percent CF on the Company's 74 MW share.

[8] At $4.70/MWH.

9. In finding 8, above, the Department determined that the replacement power costs incurred by the company were $552,513. Pursuant to G.L. c. 164, § 94G, the Department is required to specify the period over which these imprudently incurred expenses shall be returned to customers.

The appropriate period for the return of these expenses to customers is the October through December 1982 fuel charge period. The rate of interest to be used shall be the average prime rate, as posted by a major bank, during the April 1, 1982, through September 30, 1982 period. Interest shall be calculated on a daily balance which assumes one ninety-first of the imprudent expenses were collected each day from customers for the period April 1, 1982, through June 30, 1982. Interest shall also be calculated on a daily balance which assumes the Company held the money for the period July 1, 1982, through September 30, 1982. Finally, interest shall be calculated on a daily balance which assumes one ninety-second of the expenses incurred as a result of the imprudence are returned to customers each day for the October 1, 1982, through December 31, 1982, period.

10. The Department finds that Canal's investment in the NEP units was made to acquire capacity for ComElectric.[9] Although there was no written agreement in advance of the CAA, there can be no doubt, based on the evidence in this case, that Canal was acquiring capacity for the Company.

11. The Department finds that the Company was not unreasonable in obliging itself to pay costs incurred in association with a unit which was cancelled nine months earlier. Canal was acting on the Company's behalf. But for the fact that Canal was procuring the capacity for the Company, Canal would not have incurred the costs. Although there was no

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[9] Canal's investment in the NEP units was made also to acquire capacity for Cambridge Electric.

written document, it is clear that the Company, by having Canal acquire the capacity for it, had obliged itself to pay its portion of the costs related to the NEP units in advance of the cancellation.

12. The Department finds that the Company and Canal reached agreement on the charges to be made to the Company to recover the abandonment costs as required under the CAA. Canal billed these charges to ComElectric and ComElectric paid them. Although there was no written document detailing the charges agreed to by both Canal and the Company, clearly ComElectric would not have paid the bills unless it was in agreement with the charges.

13. The Department finds that the Company is entitled to recover the charges made to it by Canal for the abandonment costs incurred for the NEP units. The Company and Canal reached agreement on the charges as required under the CAA; therefore, all requirements of the CAA have been fulfilled. The FERC, after review, has allowed NEP to recover the abandonment costs associated with the NEP units in its wholesale rates. Pursuant to G.L. c. 164, § 94G, we have allowed the Massachusetts Electric Company to recover from its ratepayers costs charged to it by NEP which included the NEP units abandonment costs (*Massachusetts Electric Company*, D.P.U. 36 (1980)). Therefore, because the charges were established in conformance with the CAA, and because the FERC, after review, approved rates which allowed NEP to recover abandonment costs, the Company is allowed to recover the charges paid to Canal for the NEP units abandonment costs.

14. The Department finds that transactions between companies should be documented as clearly as possible, especially when the companies then attempt to receive Department approval for recovery of charges associated with such transactions from retail ratepayers. This is especially important when such transactions are between or involve affiliates.

15. The Department finds that the appropriate way to recover the cost of the charges from Canal for the NEP units abandonment costs is through the Company's power cost charge, using a three-year amortization beginning in December 1980, the month in which the Company first began to receive billing from Canal. In July 1982 the Company may include, for recovery purposes, all charges billed to it by Canal from December 1980 through July 1982. Thereafter, the Company may include each monthly charge from Canal in calculating its monthly power cost expenses until the cost of the NEP units abandonment is fully amortized.

16. The Department finds that the Company must request from Canal, and present to the Department, a final accounting of total abandonment costs, the calculation of the Company's share of those costs, the charges made to the Company by Canal to recover the Company's share of the costs, and the final amount recovered by Canal for the abandonment costs.

V. ORDER

Accordingly, after due notice, public hearing and consideration, it is

ORDERED: That, pursuant to the findings above, the costs attributable to the imprudence imputed to the Company total $552,513, excluding interest, and this amount shall be deducted with interest from the fuel charge for the following quarter; and it is

FURTHER ORDERED: That interest shall be computed on the total costs of $552,513 as specified in Finding 9, above; and it is

FURTHER ORDERED: That the Company shall, on or before September 18, 1982, file with the Department in D.P.U. 1003-H the interest calculations for the total costs of $552,513, calculated at the rate and in the manner directed herein.

By Order of the Department

/s/ JON N. BONSALL

Jon N. Bonsall
Chairman

A true copy
Attest;
/s/ Christopher C. Rich
Secretary

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

October 1, 1982

D.P.U. 1003-H

Application of Commonwealth Electric Company

(1) for approval by the Department of Public Utilities of a change in the Company's quarterly power cost charge, under the provisions of G.L. c. 164, § 94G, as amended by St. 1981, c. 375, commencing with meter readings in the billing month of October 1982. The Company's tariff sheet relating thereto is M.D.P.U. 98. The charges are to apply to all customers of the Company whose electric service is subject to the jurisdiction of the Department, and

(2) for approval by the Department of the price to be paid by the Company under its Qualifying Facility Power Purchase Rate schedule to producers of power from qualifying cogeneration and small power production facilities as required under the provisions of 220 C.M.R. § 8.00. The Company's tariff sheet relating thereto is M.D.P.U. 100.

APPEARANCES: Franklin M. Hundley, Esq.
May, Bilodeau, Dondis & Landergan
294 Washington Street
Boston, Massachusetts 02108
FOR: COMMONWEALTH ELECTRIC COMPANY *Petitioner*

In September 1982, the Commonwealth Electric Company ("Company") notified the Department of Public Utilities ("Department") of the Company's intent to file a quarterly adjustment to its power cost charge. Pursuant to Department guidelines, Qualifying Facility Power Purchase Rates (also called small power producer rates) are also examined in power cost charge filings.

The Department set a public hearing on the Company's application for September 24, 1982, at 11 a.m., in the offices of the Department in Boston. The Department directed the Company to publish notice of the public hearing in the Boston Globe, the New Bedford Standard Times and the Cape Cod Times.

On September 17, the Company made available for inspection in the offices of the Department its proposed quarterly power cost charge and supporting documents.

On September 24, 1982, a public hearing was held concerning this matter in the offices of the Department. The Company presented two witnesses, J. James Tasillo, Jr., Vice-President for Rates of the Company, and S. Robert Fox, Director of System Planning for the electric operating subsidiaries of the Commonwealth Energy System ("ComEnergy") (the Company is one of these subsidiaries). The Attorney General was notified of the public hearing but did not attend.

The Company introduced into evidence four exhibits. Exhibit CE-1 is entitled "Commonwealth Electric Company, D.P.U. 1003-H, Direct Testimony of J. James Tasillo, Jr.," dated September 17, 1982; Exhibit CE-2 is entitled "Commonwealth Electric Company, D.P.U. 1003-H, Direct Testimony of S. Robert Fox," dated September 17, 1982; Exhibit CE-3 is entitled "Bills and Contracts for Fuel Oil Supply, Purchased Power and Transmission Services, May through July 1982"; and Exhibit CE-4 is entitled "Schedule E-1: Energy Rate Information." In addition, the entire record of D.P.U. 1002-H, the

application of the Cambridge Electric Light Company ("Cambridge Electric") for an October through December 1982 power cost charge, was incorporated by reference in the record of this docket (Cambridge Electric is an affiliate of the Company and the same witnesses testified in the Cambridge Electric docket and in this docket). Finally, the Department moved Exhibit HO-1 into evidence. HO-1 is the Company's calculation of the amount of interest accrued on the sum the Department ordered returned to ratepayers in D.P.U. 1003-G (September 22, 1982).

The Company's proposed power cost charge of $.05618 per kilowatthour ("KWH") is $.00139 lower than the charge for the previous quarter. Included in the power cost charge for the upcoming quarter are charges which reflect the costs attributable to the Company due to the abandonment of two proposed nuclear power units in Charlestown, Rhode Island. In D.P.U. 1003-G, the Department determined, after an investigation, that the inclusion of the abandonment costs in the Company's power cost charge was proper.

At the September 28 hearing, the Department raised several issues. We requested that the Company submit two months of fuel invoices for a prior power cost charge quarter as soon as the date is available and prior to the quarterly power cost charge hearing. We inquired into the method by which the Company forecasts its power sales and the method the Company uses in accounting for these sales. The Department requested that the Company separate the amounts billed to Account 555 (reflecting the amount spent by the Company for purchased power) into capacity and energy charges, both in the present filing and in future filings. Finally, the Department questioned the Company on the manner in which the Company's small power producer rates were calculated.

In D.P.U. 1003-G, the Department, after an investigation, found the Company liable for certain imprudently incurred

costs relating to the December 7, 1981, to April 8, 1982, unscheduled outage at the Pilgrim 1 nuclear unit. Pursuant to G.L. c. 164, § 94G, the imprudently incurred costs are to be returned to the Company's ratepayers, with interest. In D.P.U. 1003-G, the Department ordered that the costs and interest be deducted from the Company's October through December power cost charge. In Exhibit HO-1 the Company has made this interest calculation and shown the assumptions it used in making this calculation. Exhibit HO-1 indicates that the interest on the Company's imprudently incurred costs is $43,450. When this amount is added to the $552,513 found to be imprudently incurred costs, the total amount to be refunded in the October through December 1982 power cost charge period is $595,963.

FINDINGS

1. Given the information before the Department, the Department determines that the proper estimate of power costs and revenues for the October through December 1982 quarter are those proposed by the Company in this docket.

2. Pursuant to its findings in D.P.U. 1003-G, the Department determines that in the October through December 1982 period the Company shall refund through its power cost charge certain imprudently incurred costs connected with the unscheduled outage at the Pilgrim 1 unit. The Department finds that the total of the imprudently incurred costs with interest is $597,135. This amount differs slightly from the amount calculated by the Company. For the period after July 1, 1982, the Company's calculations did not include a sum for the interest earned on the interest accrued earlier. Thus, the interest for the July through September 1982 period should be $22,137.76, and not the $21,711.19 calculated by the Company. Likewise,

the interest for the October through December 1982 period should be $11,628.88, and not the $10,973.60 calculated by the Company. Using the Department's methodology, the amount to be refunded is $1,172 more than the sum the Company submitted. The following page shows the calculation of the Company's October through December power cost charge.

TABLE 1

RECONCILIATION FROM PRIOR PERIODS

Month	Fuel Revenue	Fuel Cost	Under Recovery	Other Adjustments	Cumulative Under Recovery
Prior to July 1982					3161824
D.P.U. 1003-G-6				-597135	2564689
July 1982	10825264	10818571	-6693	0	2557996
Aug. 1982	11672256	10443757	-1228499	0	1329497
Sept. 1982*	11770000	9557728	-2212272	0	-882775

PROJECTED FUEL COSTS AND KWH SALES

Month	Fuel Cost	KWH Sales
Oct. 1982**	10733524	187506000
Nov. 1982**	10636524	185610000
Dec. 1982**	11267524	202726000
Total	32637572	575842000

*Estimated
**Projected

TABLE 1
(Cont.)

CALCULATION OF THE FUEL CHARGE

1. Reconciliation from Prior Period:	-882775
2. Cost of Fuel for the Projected Period:	32637572
3. Total Fuel Costs to be Recovered:	31754797
4. Estimated KWH Sales in the Projected Period:	575842000
5. Fuel Charge During the Projected Period:	$ .05514

FUEL RELATED CASH FLOW DURING THE PROJECTED PERIOD

Month	Net Fuel Charge	KWH Sales	Fuel Revenue	Fuel Costs	Under Recovery	Cumulative Under Recovery
Oct. 1982**	.05514	187506000	10339081	10733524	394443	-488332
Nov. 1982**	.05514	185610000	10234535	10636524	401989	-86343
Dec. 1982**	.05514	202726000	11178312	11267524	89212	2869

*Estimated
**Projected

3. Given the information before the Department, the Department finds the proper Qualifying Facility Power Purchase Rates to be those proposed by the Company in this docket and set forth below. All rates are in dollars per KWH.

Voltage Level	Peak Period	Off-Peak Period	Total Period
Primary Distribution	.0630	.0500	NA
Secondary Distribution	.0659	.0522	.0570

ORDER

Accordingly, after due notice, public hearing and consideration, it is

ORDERED: That the quarterly power cost charge for meters read during the billing months of October through December 1982 shall be $.05514 per KWH; and it is

FURTHER ORDERED: That such power cost charge shall apply to all KWH sold to the Company's customers subject to the jurisdiction of the Department; and it is

FURTHER ORDERED: That such power cost charge shall be itemized separately on all such electric bills; and it is

FURTHER ORDERED: That the Company's Qualifying Facility Power Purchase Rates for the months of September through November 1982 shall be those submitted by the Company in Exhibit CE-2, Schedules E-1.1 to E-1.7; and it is

FURTHER ORDERED: That, pursuant to Section 2.6 of the Department's Performance Program guidelines, the Company shall submit actual fuel revenues and expense data for the month of September 1982 no later than November 15, 1982.

By Order of the Department

/s/ JON N. BONSALL

Jon N. Bonsall
Chairman

A true copy
Attest;
/s/ Christopher C. Rich
Secretary

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by Filing a copy thereof with the clerk of said court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

Appendix "C"

EXCERPTS FROM PART II OF THE FEDERAL POWER ACT

§ 201(a) (16 U.S.C. § 824(a))

(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

§ 205 (16 U.S.C. § 824d)

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisidiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of

such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the person in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

§ 206 (16 U.S.C. § 824e)

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classifica-

tion is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

§ 207 (16 U.S.C. § 824f)

Whenever the Commission, upon complaint of a State commission after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: Provided That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

§ 306 (16 U.S.C. § 825e)

Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this chapter may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus

made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.

Appendix "D"

Mass. G.L. c. 164,. § 94G (West, 1985)

(*a*) At least once a year, on dates set by the department, each electric company having a fuel charge approved by the department shall file with the department and simultaneously with the attorney general a proposed performance program relating to fuel procurement and use. Such program shall describe for the time period or periods designated reasonably attainable targets which shall include a thermal efficiency target for the performance of the company, consistent with reasonable regional power exchange requirements; provided, however, that such requirements do not impede an individual utility within the regional power exchange system from producing and distributing electric power at optimum efficiency and economy in a manner not detrimental to the public interest. Such program also shall provide for the efficient and cost-effective operation of individual generating units by an electric utility company in meeting the minimum needs of each unit of said company to maintain sufficient reserves of power for purposes of reliability and efficiency. Such program also shall describe the historic data, industry standards or reports, simulation models or other information and techniques upon which projections of the company's performance are based and shall include, as goals for individual and system plant performance, availability, equivalent availability, capacity factor, forced outage rate, heat rate on a unit by unit basis and such other factors or operating characteristics required by the department. Any such program may specify a value or a range of values for the operating characteristic in question and shall reflect operating conditions when overall performance is optimized.

Each company shall provide with the above filing the results of a unit by unit heat rate audit supervised and certified by the

department or such independent auditing or engineering firm designated by the department and a statement prescribed under the pains and penalties of perjury that said company has used all reasonable means to procure the lowest possible costs for all fuel and purchased power. In addition, the department shall require each company to file as part of any review or investigation pursuant to this section, all fuel contracts, invoices and agreements with fuel suppliers, and such other information and reports as the department deems necessary. The department also shall require each company to file any reports of tests, studies or audits conducted or compiled for filing with or for review by any regional power exchange, research association or federal agency to which said company is affiliated, associated, or is required to report to, as the case may be. The department shall review, and may investigate upon its own motion or upon motion of the attorney general, any agreements, practices, and procedures which exist between the electric company and any of its suppliers of fuel or purchased power to determine whether such agreement, practices and procedures are in the best interest of the retail customers of such company.

Upon receipt of such filing, the department shall, after public notice, hold a public hearing to review the proposed program. In its proceedings to evaluate a performance program, the department may consider studies, analyses, audits and other tests relative to the program or any part thereof, any of which the department may perform itself or require the company to provide. The department shall within ninety days of such filing approve such program for each company as proposed or as modified by order of the department after such hearing. In no event shall such program allow for the recovery of zero power costs as defined herein.

Each such electric company shall file with the department, with the frequency and in the standardized form established by the department, data and reports on the actual unit by unit

and system performance of the company with respect to each target set forth in the approved performance program. If any such periodic report indicates that actual system performance varied from the approved targets, upon order by the department or petition of any party to the proceeding the company shall, at the next following fuel charge hearing under subsection (*b*), present evidence explaining such variance. In the course of such hearing, the department shall investigate such variance, may otherwise inquire into an issue related to the procurement or use of fuel or purchased power included in the fuel charge and properly raised by any party, and, in either event, shall make a finding whether the company failed to make all reasonable or prudent efforts consistent with accepted management practices, safety and reliability of electric service and reasonable regional power exchange requirements to achieve the lowest possible overall costs to the customers of the company for the procurement and use of fuel and purchased power included in the fuel charge. If the department finds that the company has been unreasonable or imprudent in such performance, in light of the facts which were known or should reasonably have been known by the company at the time of the actions in question, it shall deduct from the fuel charge proposed for the next quarter or such other period as it deems proper the amount of those fuel costs determined by the department to be directly attributable to the unreasonable or imprudent performance.

The department may continue the hearing into any such performance issue for a period of up to ninety days after its commencement, during which period the department shall render its decision; provided, however, that any such continuance shall not delay the approval by the department of any proposed fuel charges. At such time or times, the department shall specify, the portion, if any, of the fuel charges which is conditionally approved pending resolution of the performance issue. If the hearing results in a finding of unreasonable or

imprudent performance, the department shall deduct from the fuel charge for the next following quarter the imprudently incurred fuel costs with interest calculated at such rate and for such period as the department deems appropriate to make the customers whole.

Any deductions ordered by the department pursuant to this subsection shall be subject to judicial review and the electric company shall be made whole with interest if the department's finding of imprudence is overruled. The department may allow for the deduction of imprudently incurred fuel costs from the fuel charge over a fixed period of time, as determined to be appropriate by the department, whenever, in its judgment, the full deduction, as provided in the preceding paragraph, of such costs would jeopardize the financial integrity of the company or otherwise be contrary to the public interest.

All materials required to be filed with the department pursuant to this section shall be in such standardized form and with such frequency as established by the department.

(*b*) The department may approve an itemized fuel charge in rates filed by electric companies to reflect changes in prudently incurred reasonable costs of fuels and power purchased by such companies. Such fuel charge may be based on reasonable estimates of the total costs of fuel to be used in generating or supplying electricity to customers and power purchased for resale to customers, as appropriate in accordance with the company's fuel charge rate schedule, during the quarter in which the charge shall apply. The burden of proof shall be upon the utility company to demonstrate the reasonableness of energy expenses sought to be recovered through the fuel charge. The fuel charge shall be billed to all customers of the company at uniform per kilowatt-hour rates and the total amount of such costs to a customer shall be itemized on the customer's bill. Such rates may be time-differentiated but shall not otherwise differ among classes of customers or by the amount of a customer's usage.

Electric companies shall file quarterly under the pains and penalties of perjury, proposed fuel charges with the department which shall be filed simultaneously with the attorney general. No such fuel charge shall be billed to customers without the specific approval of the department after a public hearing. Such hearing shall be held within fourteen days after the filing by the electric company of a proposed fuel charge. Upon receipt of such a filing, the department shall forthwith cause notice of the time, place and subject matter of the public hearing to be published once at least seven days prior to such hearing in a newspaper of general circulation in the area served by the filing company. At such hearing the department shall consider and investigate the filing of the company with all related materials and reports of actual fuel and purchased power costs and fuel charge revenues for the three months preceding the month of the filing which shall be subscribed and sworn to by the company under the pains and penalties of perjury. The department shall render its decision within thirty days following the commencement of such hearing, except as provided under subsection ninety-four G (*a*). The approved fuel charge shall reflect a reconciliation for any differences between the fuel charge revenues and actual fuel and purchased power costs, less zero power costs as defined herein, for the three months preceding the month of the filing as well as estimated differences for the month of the filing and all other adjustments determined by the department pursuant to this subsection and subsection (*a*).

In the event of overcollection of fuel charges by a utility for the preceding three month period, the department shall determine what part, if any, of such overcollection is attributable to the overestimation of unit fuel prices by the utility and shall order that interest on that part, calculated at a rate to be determined by the department, be returned to the ratepayers; provided, however, that such rate of interest shall be applied

to that part of the overcollection only in the event that the estimates of unit fuel prices for the preceding three months exceeded the actual unit fuel price by more than five per cent. Any such overcollection and interest payments shall be returned to the ratepayers in the aforementioned reconciliation process at a fuel charge hearing held quarterly pursuant to the provisions of this section. In no case shall such interest payments be included in any fuel charge or in the normal operating costs of each such electric utility company.

Electric companies filing fuel charges shall submit monthly data in a standardized format determined by the department, of fuel costs, purchased power charges with the accompanying service classification of each type of power received or dispatched, zero power costs, kilowatt-hour usages, revenues derived from fuel charges and any other such information as the bureau may require for monitoring such fuel and purchased power costs. If, after review of said data, the bureau determines that a utility company is operating an individual generating unit in a manner inconsistent with its most recently approved annual performance program, or otherwise does not provide its consumers with energy in an efficient and cost-effective manner, the bureau shall notify the department of its findings. Upon receipt of such notification, the department shall order the company to present evidence, at the next following fuel charge hearing held pursuant to this section, explaining such variance or submit plans and specifications to repair or improve said unit. In the course of such hearings, the department shall investigate such variance and if the department finds that the company has been unreasonable or imprudent in such performance, in light of the facts which were known or should reasonably have been known by the company at the time of the actions in question, it shall deduct from the fuel charge proposed for the next quarter the amount of those fuel costs determined by the department to be directly attributable to the

company's defective operation of such generating unit above its minimum needs to maintain sufficient reserves of power for purposes of reliability and efficiency. The department shall also take additional steps as it deems necessary to ensure compliance with this subsection. Such monthly data, all electric company fuel and power supply contracts and agreements, fuel invoices and all reports required pursuant to subsection (*a*) shall be included with, or submitted prior to the company's fuel charge filing and shall become part of the department's records.

Upon request of an electric company, the department, after public hearing, may approve an interim adjustment in the fuel charge then in effect for such company upon a finding that actual fuel costs exceed the approved quarterly estimates by more than ten per cent, and upon a finding that the company has demonstrated by clear and convincing evidence that all reasonably possible efforts were made to meet the standards established pursuant to subsection (*a*). Whenever an electric utility company determines that collections from the approved quarterly fuel charge will exceed the actual fuel costs of an electric company by more than ten per cent, said electric utility company shall forthwith notify the department and the department may, after public hearing, approve an interim adjustment in the fuel charge then in effect for such company.

(*c*) The department shall from time to time review the participation of an electric company in a regional power exchange and report its findings to the clerk of the senate and the clerk of the house, along with its recommendations. The department may petition the appropriate federal regulatory authority to implement its findings and recommendations.

(*d*) Upon request filed by an electric company, the department may allow interim adjustments to the base rates of such company to reflect extraordinary increases in operating, maintenance or capital costs for fuel procurement or the im-

provement of efficiency in operating generation facilities whenever the department finds by clear and convincing evidence after a public hearing that such increased expenditures were neither incurred as a result of company imprudence nor incurred in the ordinary course of business and would result in a net reduction in the cost of electric service by virtue of a reduction in fuel or purchased power costs in excess of the costs of such increased expenditures.

Nothing in this subsection shall be interpreted to authorize such interim adjustments to the base rates of any electric company for operation and maintenance expenses incurred as a result of a forced or unscheduled outage. Nothing herein shall be interpreted to authorize such interim adjustments for the immediate recovery by a utility company of the costs of construction work in progress.

(*e*) The department may promulgate such rules and regulations as it deems appropriate to carry out the provisions of this section and may, after public hearing, incorporate the use of any factors, in addition to and not inconsistent with factors set forth in this section in its considerations under any subsection hereof.

(*f*) For the purpose of this section, the following terms shall have the following meanings: —

"Line losses", the unavoidable losses of electricity that occur during the transmission and distribution of electric power.

"Retail customer", any purchaser of electricity regulated by the department.

"Zero power costs", fuel costs attributable to a utility company's generation of electricity which was neither purchased nor consumed by a retail customer of said company and is in excess of minimum needs to maintain sufficient reserves of power for purposes of reliability and efficiency, as determined by the fuel charge monitoring bureau, and to maintain the most economical levels of operation, consistent with reasonable regional power exchange requirements; provided, however, that such electricity shall not include line losses as defined herein.

Appendix "E"

A G R E E M E N T

between

Boston Edison Company

and

New Bedford Gas and Edison Light Company

August 1, 1972

NEGEA SERVICE CORP.

SEP 28 1972

LIBRARY - FILE DEPT.

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BASIC AGREEMENT

Agreement dated August 1, 1972 between BOSTON EDISON COMPANY, a Massachusetts Corporation, ("Seller") and NEW BEDFORD GAS AND EDISON LIGHT COMPANY, a Massachusetts Corporation, ("Buyer").

Seller is constructing a nuclear generating unit and its associated facilities ("the Unit") at Plymouth, Massachusetts, which is expected to have a capacity of approximately 657,000 kilowatts. Seller is willing to make available and Buyer is willing to purchase eleven percent (11%) of capacity and the energy corresponding thereto upon the terms and conditions set forth herein.

Accordingly, in consideration of the mutual covenants and agreements herein contained, the parties contract and agree with each other as follows:

1.0 Sale and Purchase

1.1 The terms and conditions upon which Seller agrees to sell and Buyer agrees to purchase capacity of the Unit and energy corresponding thereto are set forth in the provisions of this Basic Agreement and:

Appendix A - Entitlement, pp. 88a-89a;
Appendix B - Delivery, Transmission and Metering, pp. 90a-91a;
Appendix C - Payment, pp. 92a-98a;
Appendix D - General Terms and Conditions, pp. 99a-103a.

Such appendices are attached hereto and made part of this Agreement.

2.0 Term of Agreement

2.1 The term of this Agreement shall commence on the date of this Agreement and shall terminate twenty-eight (28) years from the date of commercial operation, presently estimated to be the fall of 1972. The date of commercial operation shall be the date the Unit is placed in commercial operation as designated by written notice from Seller to Buyer.

2.2 If Seller intends to operate the Unit beyond the term of this Agreement, Seller shall give Buyer written notice thereof not less than two years prior to expiration of the initial term and shall designate a period not less than two years during which Seller intends to operate said Unit, and Buyer agrees to extend this contract for said period. If Seller elects to extend said contract, the procedures for one or more further extensions of this contract shall be repeated in the same manner as provided above in this paragraph.

2.3 If at any time after the date of commercial operation no deliveries are made under this Agreement for one or more periods of at least one hundred twenty (120) consecutive days each, the term of this Agreement, subject to all the provisions hereof, will be extended for a period equal to the aggregate of such periods.

3.0 Construction

3.1 Seller shall construct the Unit with due diligence and will use its best efforts to complete and place it in commercial operation. Seller will keep the Buyer reasonably informed of the current progress of construction and the estimated date of commercial operation based on such progress.

3.2 Seller shall have sole responsibility for construction or subsequent modifications of or additions to the Unit. Buyer shall have the right to consult with Seller concerning sig-

nificant decisions with respect to construction or subsequent modifications of or additions to the Unit, but such right of consultation shall not in any way limit the sole discretion of Seller in making such decisions.

4.0 Operation, Maintenance and Dispatch

4.1 The Unit shall be maintained and dispatched in accordance with the provisions of the Interim NEPEX Power Exchange Agreement currently in effect or the provisions of such other power exchange agreement as may supersede it. If no such agreement is in effect, the Unit shall be operated, maintained and dispatched in accordance with good utility practice.

4.2 Except as provided in Paragraph 4.1, Seller shall have sole responsibility for operation and maintenance of the Unit, but Seller shall supply information with respect to the Unit as reasonably requested by Buyer, and Seller shall advise Buyer of all major decisions and developments with respect to the Unit.

5.0 Repairs

5.1 In the event the Unit is damaged, the election to make any repairs thereto shall be at the sole discretion of Seller, but, if the Seller has not elected to shut down the Unit, nothing herein shall diminish Seller's duties under Section A-3.1 to use due diligence.

6.0 Cancellation of Agreement

6.1 This Agreement may only, and under no other circumstances be cancelled prior to the expiration of the term hereof by either Buyer or Seller if the Seller is unable to make energy deliveries to Buyer because the Unit is either:

(a) damaged to the extent of being completely or substantially completely destroyed, or

(b) taken by exercise of eminent domain, condemnation, or similar right, or

(c) shut down and permanently retired.

6.2 All obligations of Buyer under Paragraph 8.0 and 9.0 shall continue unaffected by any cancellation, as provided in Paragraph 6.1 except that no obligation under Paragraphs 8.0 and 9.0 shall continue in the event this Agreement is cancelled pursuant to 6.1(c) following an AEC permanent withdrawal of or failure to grant Seller a license to operate unless and until Seller has obtained within five years of the date of this Agreement a license to operate the Unit at a capacity of not less than eighty percent (80%) and has retained said license for a period expiring no earlier than five years from the date hereof; provided, however, that the foregoing shall not relieve Buyer of any obligation under Paragraphs 8.0 and 9.0 if Seller has suffered losses other than those exclusively relating to the loss of a license to operate the Unit.

7.0 Shutdown or Permanent Retirement

7.1 Buyer agrees to reimburse Seller for eleven percent (11%) of any dismantlement or removal costs or expenses incurred by Seller in the shutdown, or permanent retirement, or both, of the Unit including but not limited to any cost of removal commenced within three years after the end of the term or the date of cancellation.

8.0 Extraordinary Losses

8.1 It is the intent of this Paragraph that Buyer share with Seller any risk falling on Seller and arising pursuant to this Agreement to the extent of eleven percent (11%), and in such a manner that the risk of loss falling on Buyer is identical to such risk as would befall a complete owner of eleven percent (11%) of the Unit.

8.2 Subject to Section 6.2 Buyer agrees to indemnify and hold harmless Seller for eleven percent (11%) of any Extraordinary Losses as defined in Paragraph 8.3, regardless of when made known to either party, and which are directly or indirectly caused by or arise out of:

(a) the operation or temporary shutdown or any activity undertaken in connection with the Unit, or

(b) the shutdown or permanent retirement, or both, of the Unit or any event following such shutdown or permanent retirement, or both within three (3) years thereafter, subject to such extensions as are necessary to obtain regulatory approvals, if required, to permit such shutdown or permanent retirement, or both, provided, however, if the Unit is shut down or permanently retired for the purpose of replacement of it by a new Unit on the portion of the site occupied by said Unit, Buyer shall have no liability for the costs of such shutdown or permanent retirement, including removal costs, except as Buyer may participate in the costs of such new Unit, or

(c) a "Nuclear Incident" as currently defined in Section 11Q of the Atomic Energy Act of 1954, as amended, or

(d) condemnation or taking by any governmental agency.

8.3 "Extraordinary Losses" shall mean those losses or costs incurred by Seller and not provided for in any other paragraph of this Agreement which result from:

(a) property damage to the Unit as valued in Paragraph 9.1, in excess of the proceeds of private or governmental insurance received by the Seller, if any, or

(b) any liability resulting from property damage or personal injury in excess of private or governmental insurance proceeds received by Seller, if any, or

(c) a condemnation or taking to the extent an award associated with such condemnation or taking, if any, is less than the value of the Unit as defined in Paragraph 9.1.

9.0 Valuation

9.1 If the Agreement is cancelled pursuant to Paragraph 6.1(a) or (b), the value of property damage to the Unit for the purposes of determining those Extraordinary Losses described in Paragraph 8.3(a), or the value of the Unit for the

purposes of determining those Extraordinary Losses described in Paragraph 8.3(c), shall be equal to the Unrecovered Plant Value, as defined in Paragraph 9.4, immediately prior to such Extraordinary Loss less such recoverable salvage value as exists after the event giving rise to the Extraordinary Loss.

9.2 If this Agreement is cancelled pursuant to Paragraph 6.1(c) due to conditions other than damage to the Unit, Buyer agrees to reimburse Seller for eleven percent (11%) of the Unrecovered Plant Value of the Unit less recoverable salvage value.

9.3 If the Agreement is not cancelled and the damage resulting in such Extraordinary Loss, as described in Paragraph 8.3(a), is repaired in full, then the value of such Extraordinary Loss shall be equal to such costs of repair. Such costs shall be expensed or capitalized in accordance with good accounting practice.

9.4 Unrecovered Plant Value shall be equal to the Gross Unit Investment, as defined in Paragraph C-4.0, less all accumulated depreciation associated with the Unit.

9.5 In the event of shutdown or permanent retirement of the Unit, if the proceeds from private or governmental insurance, eminent domain awards or settlements, and salvage value, less shutdown and permanent retirement costs, if any, exceed the Gross Unit Investment less all accumulated depreciation, Buyer shall be entitled to 11% of such excess.

10.0 Corporate Obligation

10.1 This Agreement is the corporate act and obligation of the parties hereto, and any claim hereunder against any stockholder, director or officer of either party, as such, is expressly waived.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, in duplicate, as of the day and year first above written.

New Bedford Gas and Edison Light Company

By /s/ John F. Rich
Buyer President

/s/ Thomas J. Galligan Jr.
Seller

APPENDIX "A"

Entitlement

A-1.0 Amount of Capacity

A-1.1 Commencing with the date of commercial operation and continuing throughout the term of this Agreement, Seller shall make available and Buyer shall be entitled to delivery of eleven percent (11%) of capacity and energy corresponding thereto at and from the Unit as operated by the Seller hereunder. Such entitlement shall be conditioned upon the availability of the Unit and proportionate to the authorized generating capability from time to time. The net capability shall be determined by Seller, from time to time, on the basis of operating experience. For initial purposes of this Agreement, the net capability is presently estimated to be 657,000 kilowatts.

A-1.2 Prior to the date of commercial operation, Seller agrees to make available to the Buyer and Buyer agrees to take, in accordance with the terms of this Agreement, eleven percent (11%) of the net kilowatt-hours, if any, generated by the Unit. Payment for such power shall be as described in Paragraph C-10.1.

A-1.3 As soon as possible after completion of tests, and from time to time thereafter, Seller shall determine, in accordance with sound utility practice, the total loading in megawatts necessary for minimum operation. Whenever the load that might be scheduled on the Unit is not sufficient for minimum operation in accordance with such determination, Seller may at its option increase the load schedule sufficiently to obtain minimum load operations. Buyer shall be obligated to take eleven percent (11%) of such minimum output of the Unit.

A-2.0 Outages

A-2.1 If and to the extent that such information is not available to Buyer under the Interim NEPEX Power Exchange Agreement presently in effect or the provisions of such other power exchange agreement as may supersede it, Seller shall promptly notify Buyer of outages of the Unit.

A-3.0 Performance and Force Majeure

A-3.1 Subject to the provisions of this Paragraph and of Paragraph 4.0, Seller shall use all due diligence to make available to Buyer, regularly and without interruption, the electricity to which it is entitled under this Agreement, but seller does not guarantee a constant supply of such electricity and shall be excused from delivering the electricity hereunder and not be considered to be in default if and to the extent that it shall be prevented from so doing by action of a court or public authority or by reason of shutdown of the Unit due to breakdown, scheduled or unscheduled repairs or maintenance, storm, flood, lightning, earthquake, explosion, strike, fire, civil disturbance, acts of God or any cause beyond the reasonable control of Seller. The intent of this provision is that Buyer shall assume the risks of non-delivery of electricity hereunder caused by the hazards of the business to the same extent as if it were itself operating the Seller's Unit for the purpose of supplying itself with electricity; provided that Seller shall use all due diligence to resume deliveries of electricity within the earliest practicable time after cessation of the event causing such non-delivery.

APPENDIX "B"

Delivery, Transmission and Metering

B-1.0 Delivery

B-1.1 Seller and Buyer, being parties to an agreement dated March 29, 1968 whereby the transmission of power for both the Canal Station, Sandwich, Massachusetts, and the Pilgrim Station is jointly provided for, agree that the electricity made available to Buyer as provided herein shall be delivered by Seller to Buyer, in the form of three-phase, sixty hertz alternating current at the 345 kV bus of the Canal Station. Buyer shall make and be responsible for arrangements concerning the transmission of eleven percent (11%) of the output from the Unit to its system, and failure to make such arrangements shall not relieve Buyer of its obligation hereunder to pay transmission and capacity charges as described in Appendices B and C respectively.

B-1.2 Buyer shall inform Seller, within sixty days of the date of commercial operation, and each year from that date thereafter, if any portion of the capacity and energy corresponding thereto purchased under this Agreement is to be assigned to the Cambridge Electric Light Company.

B-2.0 Transmission Charge

B-2.1 Buyer agrees to pay Seller an annual wheeling charge to be billed monthly which shall be eleven percent (11%) of Seller's annual allocable costs of transmission facilities from the Unit to the Canal Station.

B-2.2 If a portion of the capacity and energy corresponding thereto purchased under this Agreement is assigned by the Buyer to Cambridge Electric Light Company, the criteria for Seller's transmission charges for transfers to

the Cambridge Electric Light Company will be determined no later than November 1, 1973 in a separate transmission contract between Buyer and Seller.

B-2.3 Charges for transmission as provided in Paragraph B-2.2 will be fixed to the extent applicable, in accordance with the provisions of the NEPOOL Agreement, so long as Seller is a party thereto.

B-3.0 Metering

B-3.1 The electricity shall be metered, subject to adjustment in amount for power transformation losses, at the 345 kV bus at the Unit switchyard.

B-3.2 Metering equipment required for the Unit shall be owned and maintained by Seller in accordance with good utility operating practice.

B-3.3 If at any time any such equipment is found to be inaccurate by more than two percent (2%) up or down, the Seller shall make it accurate and the meter billings for the period of inaccuracy shall be adjusted to correct such inaccuracy so far as the same can be reasonably ascertained, but no adjustment prior to the beginning of the next preceding month shall be made except by agreement of the parties.

B-3.4 Seller shall have, in addition to the regular routine tests, the metering equipment tested at any time upon the request of and in the presence of a representative of Buyer, and if such equipment proves accurate within two percent (2%) up or down, the expense of the test shall be borne by the party requesting such test.

APPENDIX "C"

Payment

C-1.0 Intent

C-1.1 It is the intent of the parties that during the term of the Agreement, Buyer shall reimburse Seller during the term of this Agreement as provided herein for eleven percent (11%) of all costs incurred by Seller by virtue of: (1) the construction of, or any modifications or additions to the Unit, and (2) the operation of or maintenance to the Unit.

C-2.0 Total Amount Due

C-2.1 Except as provided in Paragraph C-10.0, Buyer agrees to pay Seller monthly, commencing with the date of commercial operation and continuing throughout the term of this Agreement, 1/12th of the annual Capacity Charges as defined in Paragraph C-6.0 of this Appendix C multiplied by eleven percent (11%) plus the Monthly Energy Charge (MEC) as defined in Paragraph C-7.0 of this Appendix C. Such Capacity Charges shall be paid without regard to availability of the Unit or of transmission facilities. If such date of commencement of commercial operation occurs on a date other than the first day of a month, the Capacity Charge for the month shall be appropriately pro-rated. The monthly payment formula shall be expressed by the following equation:

$$\text{Total Monthly Amount Due} = \left(\frac{\text{An. Capacity Chg.}}{12}\right) \times 11\% + \text{MEC}$$

C-3.0 Basis of Total Amount Due

C-3.1 Buyer and Seller agree that the Total Amount Due as defined in Paragraph C-2.0 of this Appendix C shall be based upon, and in accordance with, the definitions and the methods of calculation set forth in the following paragraphs of this Appendix C.

C-4.0 Definition of Gross Unit Investment

C-4.1 Gross Unit Investment shall be:

C-4.1.1 The total of all expenditures (including appropriate interest during construction) made for or in connection with the Unit (including but without limitation such allocable land and generating and switchyard facilities properly allocable to plant investment in accordance with the Uniform System of Accounts prescribed by the Federal Power Commission for Class A and Class B Public Utilities and Licensees) at the beginning of any "contract year" (the twelve month period beginning with the first day of the month following commercial operation and each succeeding twelve month period) for which charges will be calculated. In the event that additional units are constructed at the site during the term hereof, the investment in commonly used facilities including but not limited to the harbor breakwater, land, and access road, shall be divided on a pro rata basis between the units; plus

C-4.1.2 Additions or modifications to the Unit at cost (including appropriate interest during construction), which shall be included in Gross Unit Investment commencing with the month in which said additions or modifications are placed in service; plus

C-4.1.3 An allowance for prepaid items and cash working capital which are applicable to the Unit, for a period of forty-five (45) days; plus

C-4.1.4 An allowance for materials and supplies (including nuclear fuel investment computed at the end of the prior contract year), needed to operate and maintain the Unit; less

C-4.1.5 Extraordinary retirements to the extent not charged to the depreciation reserve. Said retirements shall be reflected in the month the property is retired from service; plus or minus

C-4.1.6 All other investment cash flows relevant to the existence of the Unit.

C-5.0 Net Unit Investment

C-5.1 In order to arrive at the balance of the Net Unit Investment, the following items shall be subtracted from the balance of the Gross Unit Investment:

C-5.1.1 The balance of depreciation reserve at the end of the prior contract year where the annual depreciation charge is computed consistent with the method as described in Paragraph C-6.3.1 of this Appendix C; and

C-5.1.2 Cumulative cash generation at the end of the prior contract year arising from prior years' federal and state tax deferral due to liberalized depreciation methods and the investment credit.

C-6.0 Capacity Charges

C-6.1 Annual Capacity Charges shall equal the sum of Paragraph C-6.2 Demand Charges, plus Paragraph C-6.3 Investment Expenses.

C-6.2 Demand Charges shall be the sum of Paragraph C-6.2.1 Operating and Maintenance Costs, plus Paragraph C-6.2.2 Local Tax Expense, plus Paragraph C-6.2.3 Insurance Costs, plus Paragraph C-6.2.4 Other Expenses.

C-6.2.1 Operating and Maintenance Costs shall include all operating (exclusive of fuel costs) and maintenance costs for the contract year applicable to the Unit and properly charged as an income deduction, less any applicable credits.

C-6.2.2 Local Tax Expense shall be property taxes, both personal and real, assessed on the property.

C-6.2.3 Insurance Costs shall be the costs incurred by Seller for insurance, including but not limited to Price-Anderson indemnity or similar indemnification.

C-6.2.4 Other Expenses shall be allocated on an equitable basis for appropriate expenses which are common to both the Unit and the entire system of Seller.

C-6.3 Investment Expenses shall be the sum of Paragraph C-6.3.1 Depreciation, plus Paragraph C-6.3.2 Total Financing and Income Tax Expenses.

C-6.3.1 Depreciation applicable to the facility shall be computed on a straight line basis using Gross Unit Investment and a service life of twenty-eight (28) years. For depreciation purposes, Gross Unit Investment as defined in C-4.0 shall be adjusted to exclude associated land costs, nuclear fuel investment, prepaid and working capital items, materials and supplies. Plant retirements, both normal and extraordinary, including salvage value and cost of removal, shall also be reflected through this subparagraph in a manner consistent with the method of handling on the Seller's books of account.

C-6.3.2 Total Financing and Income Tax Expenses shall be computed by application of the following formula for the Total Financing and Income

Tax Rate as applied to the Net Unit Investment as defined in Paragraph C-5.0, but in no event shall the investment expense fall below zero.

Formula

Total Financing and Income Tax Rate

Equals:

$$BR \times BI$$

Plus $PR \times PD$

Plus $CR \times CE$

Plus $$\frac{T}{1.0-T} \times ([PR \times PD] + [CR \times CE])$$

Where:

BR = bond to total capitalization ratio, which shall be deemed to be equal to fifty-five percent (55%).

BI = weighted average of interest rates of all bond issues existing at the time of commercial operation date, revised as required to reflect refinancings of debt issues existing at the time of the commercial operation date.

PR = preferred to total capitalization ratio, which shall be deemed to be equal to ten percent (10%).

PD = weighted average of dividend rates of preferred stock existing at the time of commercial operation date, revised as required to reflect refinancings of preferred issues existing at the time of the commercial operation date.

CR = common to total capitalization ratio, which shall be deemed to be equal to thirty-five percent (35%).

CE = thirteen and one-half percent (13-½%).

T = the current effective income tax rate applicable to the equity component of capital cost, in accordance with tax statutes applicable throughout the term of this Agreement.

C-7.0 Monthly Energy Charge

C-7.1 Monthly Energy Charge (MEC) is the amount determined by the following formula:

MEC = Monthly Fuel × 11%

where: Monthly fuel = the monthly fuel burn-up expense applicable to the Unit including handling.

C-8.0 Billing

C-8.1 Bills for each month shall be rendered by the 10th day of the next succeeding month and shall be due when rendered.

C-8.2 If it becomes necessary to estimate costs, any item billed on an estimated basis shall be paid when rendered. An adjustment will be made to the extent appropriate after the actual cost of the estimated item has been determined.

C-8.3 Buyer shall not have the right to challenge any monthly bill, to invoke arbitration of the same or to bring any court or administrative action of any kind questioning the propriety of said bill after a period of one (1) year from the date the bill is rendered. In the case of a bill containing estimates, the Buyer shall not have the right to challenge the accuracy of said bill after a period of one (1) year from the date the bill is adjusted to reflect the actual amounts due.

C- 9.0 Overdue Accounts

C- 9.1 If any account due remains unpaid for more than thirty days after rendering, Seller may either: (1) suspend delivery of electricity until full payment has been made, or (2) charge Buyer's account with interest at the current prime interest rate of the First National Bank of Boston, or a similarly situated bank.

C-10.0 Prior to Date of Commercial Operation

C-10.1 If Seller makes available and Buyer takes power prior to the date of commercial operation as provided in Paragraph A-1.2 of Appendix A, Buyer will pay Seller at the rate of 4.0 mills per kilowatthour for eleven percent (11%) of the net kilowatthour output of the Unit during any month in which such power is taken.

C-11.0 Sales or Gross Receipts Tax

C-11.1 In the event Seller is required to pay a sales tax on or with respect to the sale of capacity and energy corresponding thereto to the Buyer hereunder, or a gross receipts tax on receipts from the sale of capacity and energy corresponding thereto to the Buyer hereunder, the amount of such tax will be reimbursed by Buyer to Seller.

APPENDIX "D"

General Terms and Conditions

D-1.0 Arbitration

D-1.1 Should any dispute or disagreement arise under this Agreement which cannot be settled by negotiation, then upon the written request of either Buyer or Seller to the other, the same shall be submitted to arbitration unless the matter is herein specifically made subject to resolution in another manner. The parties shall, if possible, agree upon a single arbitrator. If parties fail to agree upon a single arbitrator within thirty (30) days from the request in writing of one party to the other for arbitration, then each party shall, within fifteen (15) days after such failure, appoint one arbitrator and jointly agree as to a third arbitrator. If one party fails to appoint its arbitrator or if no agreement can be reached as to the third arbitrator, then the parties shall request the American Arbitration Association to appoint the arbitrator(s).

D-1.2 The arbitrator(s) shall, in accordance with the rules of the American Arbitration Association, arbitrate any dispute in a single proceeding in which any purchaser of power from the Unit may intervene.

D-1.3 The arbitrator(s), after opportunity for each of the parties to be heard, shall consider and decide the dispute and notify the parties in writing of the decision. Such decision shall be final and binding upon all parties and shall not be appealable in any jurisdiction. The expense of the arbitration shall be borne by the parties as determined by the arbitrator(s).

D-2.0 Laws, Regulations and Approvals

D-2.1 This Agreement is made subject to present and future Federal, State and local laws and to present and future regulations and orders properly issued by Federal, State and local bodies having jurisdiction; and performance hereunder is conditioned upon securing and retaining such Federal, State and local governmental and regulatory approvals, grants and permits as may from time to time be necessary.

D-3.0 Assignment

D-3.1 This agreement shall be binding upon and shall inure to the benefit of, and may be performed by, the successors and assigns of the parties, except that no assignment, pledge or other transfer of this Agreement by either party shall operate to release the assignor, pledgor or transferor from any of its obligations under this Agreement unless: (1) consent to the release is given in writing by the other party; (2) the other party has theretofore assigned, pledged or otherwise transferred its interest in this Agreement to such other assignee, pledgee or transferee; or (3) such transfer is incident to a merger or consolidation with, or transfer of all or substantially all of the assets of the transferor to, another person or business entity which shall, as part of such succession, assume all the obligations of the transferor under this Agreement.

D-4.0 Insurance

D-4.1 The Seller agrees to obtain and maintain in full force and effect during the term of this Agreement, adequate insurance consistent with that usually carried by corporations operating nuclear generating facilities. Such adequate insurance shall include but not be limited to Price-Anderson indemnity with responsible insurers, or governmental insurers, or both, against:

(a) public liability for bodily injury and property damage and

(b) physical loss or damage to the Unit; and

(c) such other risks as the Seller shall determine to be necessary or advisable.

D-4.2 In the event Seller constructs one or more units on the site of the Unit, either by itself or in combination with others, Seller agrees and will use its best efforts to cause such others to agree, that if damages are suffered by one or more units, insurance proceeds received on account of such property damage shall be allocated in the following manner:

(a) If one unit is damaged, then proceeds shall be allocated wholly to such damaged unit.

(b) If two or more units are damaged to the extent insurance proceeds exceed the actual damages sustained by the sum of the units, such proceeds shall be allocated to such units in proportion to actual damages suffered.

(c) If two or more units are damaged to the extent that the insurance proceeds payable are less than the total damage to such units, then such proceeds shall be allocated to each unit damaged in the proportion that the gross unit investment in each unit bears to the gross unit investment in all damaged units on the site; provided, however, that if the insurance proceeds so allocated or reallocated to any unit are in excess of the actual damages sustained by that unit, such excess proceeds shall be reallocated on the basis of proportionate gross unit investment to all remaining units whose damages are still in excess of proceeds.

(d) All such reallocations shall be repeated until all insurance proceeds have been allocated or reallocated in the manner described in (c).

D-4.3 In the event additional units should be built on the site of the Unit, Seller agrees and will use its best efforts to cause others to agree, that the premiums on any insurance procured to cover the entire site shall be allocated among all units on the basis of gross unit investment.

D-5.0 Amendments

D-5.1 All amendments to this Agreement shall be by mutual agreement and evidenced by a written amendment signed by the parties hereto.

D-6.0 Interpretation

D-6.1 The interpretation and performance of this Agreement shall be in accordance with and controlled by the laws of the Commonwealth of Massachusetts.

D-7.0 After Termination or Cancellation

D-7.1 The applicable provisions of this Agreement shall continue in effect after termination or cancellation of this Agreement to the extent necessary to provide for final billing and adjustments.

D-7.2 No Third Party Beneficiary Rights

Nothing in this contract shall create rights in any persons other than Buyer, Seller and their respective successors and assigns.

D-7.3 Agent for Buyer

NEGEA Service Corporation may act as Agent for the Buyer or for Cambridge in all matters arising under this contract, and any act of NEGEA Service Corporation shall be deemed to be with the unanimous consent of the Buyer and Cambridge.

D-7.4 Most Favored Party Clause

The Buyer and Seller deem the within contract to be substantially equivalent to a Life of the Unit Contract. If Seller enters into a contract with any third party to sell power from the Unit, said contract being substantially equivalent to a Life of the Unit Contract, on more favorable terms than those contained herein, Seller will make such more favorable terms available to Buyer provided the Buyer agrees to all terms and conditions relative to such contract. Buyer and Seller agree that an Exchange Arrangement as defined pursuant to the NEPOOL Agreement shall not be subject to the provisions of this paragraph.

JUN 11 1973

BOSTON EDISON COMPANY
GENERAL OFFICES 800 BOYLSTON STREET
BOSTON, MASSACHUSETTS

April 17, 1973

Mr. Kenneth F. Plumb
Secretary
Federal Power Commission
441 G Street, N.W.
Washington, D.C. 20426

Dear Mr. Plumb:

We enclose for filing, as an initial rate schedule, two copies of an agreement dated August 1, 1972 which provides for the purchase by New Bedford Gas and Edison Light Company (New Bedford) of capacity and related energy from Boston Edison Company's Pilgrim Unit No. 1.

This agreement commenced with the date of commercial operation of said unit, i.e., December 9, 1972 and will continue through December 9, 2000. During the term Boston Edison Company (Edison) will make available to New Bedford from the unit 11% of capacity and the energy corresponding thereto. The payment provision of the agreement is designed to reimburse Edison for 11% of the fixed and operating costs incurred by Edison as a result of the installation and operation of said unit. Deliveries under the agreement are to be made at the 345 kV bus of the Canal Station, Sandwich, Massachusetts.

Supporting data required by Section 35.12 of the Commission's Regulations is filed herewith in duplicate.

Edison is filing separately on this date a similar agreement with Montaup Electric Company, which also commenced with the commercial operation of Pilgrim Unit No. 1.

Pilgrim Unit No. 1 is the first nuclear generating unit constructed, owned and operated exclusively by Edison. In order to develop the enclosed supporting data, we felt it desirable to have sufficient operating and administrative experience to formalize our costing, accounting and billing procedures. Until this was done, we did not consider our estimates and data to be in sufficient form for filing. In light of these circumstances, Edison, pursuant to Section 35.11 of the Commission's regulations, respectively requests that the agreement filed herewith be permitted to become effective by its terms on December 9, 1972.

Pursuant to Section 36.2(f) of the Commission's Regulations, enclosed is a check in the amount of $500.00 for payment of the filing fee.

A copy of this filing has been sent to Mr. John F. Rich, who executed the agreement for and on behalf of New Bedford Gas and Edison Light Company.

Very truly yours,

/s/ Ralph M. Kelman

Enclosures
cc: Mr. John F. Rich
President
NEGEA Service Corporation
130 Austin Street
Cambridge, Massachusetts 02139

106a

BOSTON EDISON COMPANY

DETERMINATION OF ANNUAL CHARGES TO

NEW BEDFORD GAS AND EDISON LIGHT COMPANY

FOR PILGRIM UNIT NO. 1 POWER

DECEMBER 9, 1972

BOSTON EDISON COMPANY NEW BEDFORD GAS AND EDISON LIGHT COMPANY PILGRIM UNIT NO. I

Estimated Sales and Revenues — 12 Months Ending December 8, 1973

	MWH	Capacity Charge	Energy Charge** 2.16 Mills	Transmission Charge	Total
1972 December (23 days)	31,154	$ 397,719*	$ 67,021*	$ 3,549	$ 468,289
1973 January	48,409	536,056*	105,760*	4,773	646,589
February	45,321	536,056	97,893	4,761	638,710
March	45,321	536,056	97,893	4,750	638,699
April	45,321	536,056	97,893	4,738	638,687
May	45,321	536,056	97,893	4,726	638,675
June	45,321	536,056	97,893	4,715	638,664
July	45,321	536,056	97,893	4,703	638,652
August	45,321	536,056	97,893	4,691	638,640

Estimated Sales and Revenues
(Cont.)

12 Months Ending December 8, 1973

	MWH	Capacity Charge	Energy Charge** 2.16 Mills	Transmission Charge	Total
September	45,321	536,056	97,893	4,680	638,629
October	45,321	536,056	97,893	4,668	638,617
November	45,321	536,056	97,893	4,657	638,606
December (8 days)	11,696	138,337	25,263	1,198	164,798
Totals	544,469	$6,432,672	$1,176,974	$56,609	$7,666,255

Estimated Heat Rate: 10,382 BTU/kWh
Estimated Fuel Cost: 20.8¢/10⁶ BTU

* Actual Charge

** 2.16 Mills/kWh assumed for February through December based upon January 1973 actual experience.

BOSTON EDISON COMPANY
NEW BEDFORD GAS AND EDISON LIGHT COMPANY
PILGRIM UNIT NO. 1
DETERMINATION OF CAPACITY CHARGES
(IN DOLLARS)

December 9, 1972 - December 31, 1972

A. Total Capacity Charges	$58,478,896
B. New Bedford - 11% of "A"	$ 6,432,678
C. Monthly Charge (÷ 12)	$ 536,056
D. Prorated for Period 12/9/72-12/31/72	
23/31 × $536,056	$ 397,719

January 1, 1973 - January 31, 1973

A. Total Capacity Charges	$58,478,896
B. New Bedford - 11% of "A"	$ 6,432,678
C. Monthly Charge (÷ 12)	$ 536,056

February 1, 1973 - November 31, 1973

Monthly Charge of $536,056 as determined for January, 1973

December 1, 1973 - December 8, 1973

A. Total Capacity Charges	$58,478,896
B. New Bedford - 11% of "A"	$ 6,432,678
C. Monthly Charge (÷ 12)	$ 536,056
D. Prorated for period 12/1/73-12/8/73	
8/31 × $536,056	$ 138,337

BOSTON EDISON COMPANY
PILGRIM I
DETERMINATION OF CAPACITY CHARGES - ESTIMATED
(EXHIBIT "A")

I. Investment Bases for Capacity Charges

A. Gross Investment - 11/30/72

1. Station Cost	$184,306,501	
2. Allowance for Funds	38,806,043	
3. Property Taxes	8,673,786	
4. Switchyard	2,720,421	
5. Station Depreciable Base	234,506,751	
6. Less - Depreciation Reserve	-0-	
7. Net Station Investment	234,506,751	
8. Land	711,115	
9. Plus: Working Capital	1,000,000	
10. Plus: Nuclear Fuel 11/30/72	33,250,000	
11. Less: Deferred Taxes Reserve	(4,432,596)	
12. Less: Investment Tax ~~Credit~~	(1,716,165)	
13. New Unit Investment		$263,319,105

II. Capacity Charges

A. Investment Costs

1. Depreciation Expense (Annual Rate 3.5714%)	$ 8,375,174
2. Financing and Income Tax Expense (14.775%)	38,905,398
3. Total ~~Investments Cost~~	$ 47,280,572

BOSTON EDISON COMPANY
PILGRIM I
DETERMINATION OF CAPACITY
CHARGES - ESTIMATED
(EXHIBIT "A")
(Cont.)

B. Demand Costs

1. Operation and Maintenance	$ 2,984,000
2. Local Taxes	6,522,324
3. Insurance Costs	875,000
4. Other Costs (Allocable G & A)	817,200
5. Total Demand Costs	$ 11,198,324

C. Total Capacity Charges $ 58,478,896

BOSTON EDISON COMPANY
PILGRIM I
DETAIL OF ESTIMATED CAPACITY CHARGES

I. Investment Costs

A. Depreciation Expense

1. Depreciable Investment Base - 11/30/72	$234,506,751	
2. Depreciable Service Life	28 Years	
3. Annual Book Depreciation rate	3.5714%	
4. Depreciation Expense $234,506,751 × .035714 =		$ 8,375,174

B. Financing and Income Tax Costs

1. Net Unit Investment			$263,319,105
2. Financing Costs			
a. Bonds 55% × 6.71%	=	3.691%	
b. Preferred 10% × 6.64%	=	0.664	
c. Common 35% × 13.5%	=	4.725	
d. Total Financing		9.080	$23,909,375
3. Income Tax @ 51.38%			
4. (0.664 + 4.725) $\left(\frac{T}{1-T}\right)$	=	5.695	14,996,023
5. Financing and Income Tax Factor		14.775%	$38,905,398

II. Demand Costs

A. Operation and Maintenance

1. Pilgrim I O & M Estimate per kWhr.	0.61 Mils	
2. Estimated Annual Production		
8,760 Hours × 657,000 kW × .85 = 4,892,022,000 kWhrs.		
3. Estimated Pilgrim I O & M =		$ 2,984,000

B. Local Taxes

1. Local Tax Percent	3.5%	
2. Local Tax Base	$186,352,112	
3. Local Tax		$ 6,522,324

C. Insurance Costs

1. Estimated Property Insurance	$ 605,000	
2. Estimated Liability Insurance	$ 270,000	
3. Total		$875,000

D. Estimated Allocable G & A Expense

1. Total Electric O & M Expense - 1971	$136,710,568	
2. Less - Fuel and Purchased Power	72,807,922	
3. Operation & Maintenance Allocation Base	$ 63,902,646	
4. Estimated Pilgrim O & M (II. A. Above)	2,984,000	
5. Percent Pilgrim: Total Basis	4.67%	
6. Total General and Adm. - 1971	$18,665,521	
7. Less: Prop. & Liab. Insurance	1,165,585	
8. Allocable General & Adm.	$ 17,499,936	
9. Pilgrim G & A Allocation (Rounded)		$817,200

BOSTON EDISON COMPANY

NEW BEDFORD GAS AND EDISON LIGHT COMPANY
PILGRIM UNIT NO. 1
DETAIL OF ANNUAL OPERATING COSTS OTHER THAN FUEL

Exhibit "B"
(Thousand Dollars)

F.P.C. Acct. Nos.	Description	Amount	
	Power Production Expense		
517	Operating Supervision and Engineering	$ 48	
519	Coolants and Water	190	
520	Steam Expenses	750	
523	Electric Expenses	346	
524	Miscellaneous Nuclear Power Expense	$ 218	
	Total Operating Accounts (Less Fuel)	$1,552	
528	Maintenance Supervision and Engineering	40	
529	Maintenance of Station Structures	180	
530	Maintenance of Reactor Plant Equipment	505	
531	Maintenance of Electric Plant	627	
532	Maintenance of Miscellaneous Nuclear Plant	80	
	Total Maintenance Accounts	$1,432	
	Total Operation and Maintenance (Less Fuel)		$2,984

F.P.C. Acct. Nos.	Description	Amount	
	Administrative and General Expenses		
920	Salaries	$ 241	
921	Expenses	146	
923	Outside Consultants	17	
926	Employee Benefits	245	
928	Regulatory Commission Expense	11	
930	Miscellaneous General Expense	59	
931	Rents	82	
932	Maintenance of General Plant	16	
	Sub-Total	$ 817	
	Taxes		
408.1	Federal Unemployment Compensation	*	
408.1	Federal Insurance Contribution Act	*	
408.1	State Unemployment Insurance	*	
	Total	*	
	Total Allowance for Other Costs		$817

* Taxes were unintentionally not included in list of operating costs in billings to New Bedford Gas and Edison Light Company. Taxes were therefore not included in the above list in order to maintain consistency in billing and filing. These taxes are estimated to be:

408.1	Federal Insurance Contribution Act	$ 2
408.1	Federal Unemployment Compensation	62
408.1	State Unemployment Insurance	9
	Total	$ 73

BOSTON EDISON COMPANY
NEW BEDFORD GAS AND EDISON LIGHT COMPANY
PILGRIM UNIT NO. 1
DETERMINATION OF TRANSMISSION CHARGE
(IN DOLLARS)

EXHIBIT "C"

	1972 December (23 days)	1973 January	1973 February
BECo Support Charges-Line #342 (Pilgrim Station to Canal Station)			
a. Pilgrim Station to Myles Standish State Forest (62.5% of charges)	14,782	19,876	19,829
b. Myles Standish State Forest to Canal Station (62.5% of charges)	25,548	34,359	34,274
c. Total Edison Support Charges for Line #342 (a + b)	40,330	54,235	54,103
BECo's Transmission Charge* to New Bedford Gas and Edison Light Company	3,549	4,773	4,761

* The transmission charge is the product of: (item 1C) × (50%/62.5%) × (11%). 62.5% is BECo's financial charge responsibility percentage of the total charges of line # 342. The 62.5% is based on Pilgrim Unit No. 1 being responsible for 50% of all charges associated with Line # 342 and Canal Unit No. 1 being responsible for 50% of all charges of Line #342. Where BECo owns the entire Pilgrim Unit No. 1 it assumes the associated 50% charge of Line # 342 and where BECo purchases 25% of Canal Unit No. 1 it assumes one-fourth of the associated 50% charge of Line #342 (or 12.5%) for a total BECo charge responsibility of 62.5% (which are the charges shown in item 1C above). Because New Bedford is purchasing 11% of Pilgrim Unit No. 1 the allocable transmission charges (item 2) would be 11% times Line #342 charges allocable to Pilgrim Unit No. 1 or 11% × 50%/62.5% × item 1C.

BOSTON EDISON COMPANY
NEW BEDFORD GAS AND EDISON LIGHT COMPANY
PILGRIM UNIT NO. 1
DETERMINATION OF TRANSMISSION CHARGE
(IN DOLLARS)

EXHIBIT "C" (Cont.)

1973 March	1973 April	1973 May	1973 June	1973 July
19,783	19,735	19,689	19,643	19,595
34,189	34,104	34,018	33,933	33,848
53,972	53,839	53,707	53,576	53,443
4,750	4,738	4,726	4,715	4,703

1973 August	1973 September	1973 October	1973 November	1973 December (8 days)
19,549	19,503	19,456	19,408	4,997
33,763	33,678	33,593	33,508	8,625
53,312	53,181	53,049	52,916	13,622
4,691	4,680	4,668	4,657	1,198

FEDERAL POWER COMMISSION
WASHINGTON, D.C. 20426

IN REPLY REFER TO:
PWR-RC
Docket Nos. E-8138
E-8140

Boston Edison Company
Attention: Mr. Ralph M. Kelmon
800 Boylston Street
Boston, Massachusetts 02199

Gentlemen:

By letters dated April 19, 1973, you submitted for filing two separate initial unit sale agreements with New Bedford Gas and Edison Light Company (New Bedford) and Montaup Electric Company (Montaup) providing for the sale of power from your company's Pilgrim Unit No. 1. Your submittals have been accepted for filing and are designated as follows:

Designation	Other Party
Boston Edison Company Rate Schedule FPC No. 68	New Bedford
Boston Edison Company Rate Schedule FPC No. 69	Montaup

Notice of the proposed filings was issued May 8, 1973, with comments, protests, or petitions to intervene due on or before May 30, 1973. No comments, protests, or interventions have been filed.

With reference to your request for waiver of the notice requirements, the Commission has found that good cause has been shown for such action pursuant to the requirements of Section 205(d) of the Federal Power Act and Section 35.11 of the Commission's Regulations thereunder and has provided that the rate schedules shall become effective December 9, 1972.

This acceptance for filing does not constitute approval of any service, rate charge, classification, or any rule, regulation, contract, or practice respecting such rate or service provided for in the above-designated rate schedules; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commision in any proceeding now pending or hereafter instituted by or against your company.

This acceptance for filing terminates Docket Nos. E-8138 and E-8140.

By direction of the Commission.

Mary B. Kidd
Acting Secretary

cc: New Bedford Gas and Edison Light company
Attention: Mr. John F. Rich
President
130 Austin Street
Cambridge, Massachusetts 02139
Montaup Electric Company
Attention: Mr. John F. G. Eichorn, Jr.
President
Somerset, Massachusetts 02745

Supreme Court, U.S.
FILED
AUG 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-61

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

COMMONWEALTH ELECTRIC COMPANY,

Petitioner,

v.

DEPARTMENT OF PUBLIC UTILITIES
OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of
Certiorari to the Supreme
Judicial Court of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Thomas A. Barnico
Counsel of Record
Assistant Attorney General
Department of the
Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-1004

QUESTION PRESENTED

Does the Federal Power Act, or the Commerce and Due Process Clauses, prohibit the Massachusetts Department of Public Utilities from determining that a Massachusetts retail electric company shares responsibility with another Massachusetts retail electric company for the imprudent management of an outage at a Massachusetts nuclear plant, and from excluding from retail rates the resulting imprudently incurred costs of replacement power.

PARTIES

This Brief in Opposition is submitted on behalf of the respondent Department of Public Utilities of the Commonwealth of Massachusetts (referred to in the petition and herein as the "MDPU").

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No. 86-61

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DEPARTMENT OF PUBLIC UTILITIES
OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of
Certiorari to the Supreme
Judicial Court of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court (Pet. 1a-26a) is reported at 397 Mass. 361, 491 N.E. 2d 1035 (1986). The decisions of the MDPU (Pet. 27a-62a) are unreported.

JURISDICTION

The judgment and opinion of the Massachusetts Supreme Judicial Court were entered on April 22, 1986. Pet. 1a. On July 2, 1986, petitioner filed a petition for rehearing in the Supreme Judicial Court. The petition sought reconsideration of the judgment in light of this Court's decision in Nantahala Power & Light Co. v. Thornburg, No. 85-568 (June 17, 1986) (Nantahala). On July 10, 1986, the Supreme Judicial Court denied the petition for rehearing. Pet. 8.

The petition in this Court was filed on July 18, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

An accurate statement of the statutes and constitutional provisions involved in the case appears at the following pages of the petition: pages 2-3 (text of petition); pages 10a-16a (opinion of Massachusetts Supreme Judicial Court); and 63a-75a (text of pertinent federal and state statutes).

STATEMENT OF THE CASE

An accurate statement of the case appears at pages 3a-5a (opinion of the Massachusetts Supreme Judicial Court) of the petition.

REASONS FOR DENYING THE WRIT

The Supreme Judicial Court correctly held (1) that the petitioner Commonwealth Electric Company (the company) shared responsibility under state law for the increased costs caused by the mismanaged outage at the Pilgrim nuclear power plant, and (2) that the earlier filing of the power contract between the company and Boston Edison Company (Edison) with the Federal Energy Regulatory Commission (FERC) did not preclude the MDPU from imputing Edison's imprudence to the company or excluding from retail rates the replacement power costs incurred by the company during the outage. For the following reasons, the writ should be denied.

I. THE MDPU EXERCISED POWER RESERVED TO THE STATES BY THE FEDERAL POWER ACT AND THE F.E.R.C.

The primary ground for the petition is the claim that the Federal Power Act (FPA) preempts any state review of the prudence of retail electric company costs caused by the unreasonable extension of an outage at a nuclear plant which supplies its power. The company advances three points to buttress its claim of preemption: (1) the decision conflicts with the interpretation of the FPA rendered by this Court in its recent decision in Nantahala; (2) the MDPU action "challenges the congressional scheme for wholesale electric regulation"; and (3) the decision "will discourage retail electric companies from selecting one of

the valuable [wholesale] supply options endorsed by FERC." Pet. 10-17. None of these points are persuasive and the Supreme Judicial Court's rejection of the company's preemption claim is amply supported by the language and legislative history of the FPA and by FERC decisions which support state review of the prudence of a retail company's actions in purchasing electricity at wholesale.

1. The decision below does not conflict with the "filed rate" doctrine or the Court's decision in Nantahala.[1/]

1/ A remand of this case for reconsideration in light of Nantahala, as the company suggests, Pet. 20, is inappropriate in this instance. A summary remand order is appropriate only to "compel reexamination of a case" in light of intervening precedent. Henry v. City of

(footnote continued)

The "filed rate" doctrine requires that "interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." Nantahala, slip. op. at 8. Unlike the claim here, the issue in Nantahala was whether the state's allocation of "entitlement power" in retail rate proceedings was inconsistent with FERC's allocation of the

---

(footnote continued)

Rock Hill, 376 U.S. 776, 777 (1964). See, e.g., Eckerd Drugs, Inc. v. Brown, 457 U.S. 1128 (1982); Lane v. Smith, 457 U.S. 1102 (1982). Here, "reexamination" in light of Nantahala already has occurred. The company's petition for rehearing in the Supreme Judicial Court expressly relied on Nantahala, and that petition was denied. Pet. 8. As such, there is no practical object to a summary reconsideration order, and the company's request for remand and reconsideration therefore should be denied.

same wholesale power in a previous proceeding. Id. at 8-9. The Court found that the state order ran "directly counter to FERC's order. . . ." Id. at 15. In this case, however, no FERC order was or could have been contradicted by the action of the MDPU.

There is no doubt that FERC "clearly has exclusive jurisdiction over the rates to be charged . . . interstate wholesale customers." Nantahala, slip. op. at 13. "Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." Id. However, as the court below correctly noted, "the Federal regulation of the rates for wholesale transactions is not disturbed by [state] inquiry into the prudence of a retail seller . . . in incurring particular

costs." Pet. 19a.

The company emphasizes the "trapping" effect of the MDPU order. However, "trapping" occurs only where the state's exclusion of retail costs overrides an express judgment of FERC that those costs were reasonably incurred by the buyer. Nantahala, slip. op. at 17. There is no such FERC judgment in this instance. In Nantahala, a federal-state conflict arose not because the state action affected costs related to a wholesale transaction, but because the State had attempted to negate a decision of FERC which had decided the same issue - Nantahala's entitlement to low cost power. In this case, no FERC proceeding considered how the imprudent management of the Pilgrim outage led to the company's need for replacement power. Since Edison provided

the company no power during the outage, its FERC-approved rate for sales to the company never reflected outage costs or imprudent management. For these reasons, the Supreme Judicial Court properly held that "the issue raised here could not, and should not, have been raised in an FERC rate-approval proceeding or a review of an FERC decision." Pet. 21a.

Thus the petition presents a quite different case from that considered in Nantahala. The company argues, however, that since its "need" for the replacement power arose "as a result of" the non-performance of the FERC-filed, Pilgrim I contract, and since the contract "contemplated" outages, then FERC has automatically endorsed as "reasonable" all costs of replacement power, regardless of whether mismanagement created the

"need" for the replacement power in the first place. Pet. 12-13. That argument is inconsistent with the purpose and scope of the FPA.

In enacting the FPA, Congress intended that state commissions would retain authority to exclude unreasonable costs from retail rates. Increased costs of service attributable to mismanagement fall within the scope of this authority. Likewise, mismanagement found under state law to be the shared responsibility of two retail companies does not escape state oversight simply by virtue of a contract for power between those companies. In this case, the need for replacement power may be deemed unreasonable under state review of the mismanaged outage, even though the energy not

supplied is normally sold at a FERC-approved price. See Nantahala, slip op. at 19. With regulatory authority allocated in this manner, the state's jurisdiction does not overlap FERC's authority to approve a wholesale rate as "just and reasonable" and permit a seller to charge a buyer that rate. No conflict occurs because the state's inquiry does not reexamine the wholesale rate to determine whether it reflects the reasonable costs of service of the wholesale seller.

The company raises the specter of "an ever increasing number of state proceedings seeking to establish that its citizens experienced excessive rates because of wholesale imprudence." Pet. 15. This argument overstates the terms and effects of the decisions below. The

MDPU authority affirmed by the Supreme Judicial Court is the power to review the prudence of the actions of retail companies. Indeed, the MDPU's initial findings of Edison's imprudence were entered in a retail fuel charge hearing, because Edison's power generation and retail service fall within the exclusive jurisdiction of the MDPU. Pet. 3a-5a. Thus, the imputation of imprudence in this case did not affect any FERC-established wholesale rates.

In short, there is no conflict with the FPA or Nantahala because the FPA permits the states to enforce a retail company's state law duty to secure power supplies at the lowest possible cost consistent with reliable service. See Pike County Light & Power v. Pennsylvania Public Utility Commission, 77 Pa. Commn.

268, 456 A. 2d 735 (1983).[2] Since the MDPU has not "usurped a function that Congress has assigned to a federal regulatory body," Nantahala, slip op. at 10, quoting Arkansas-Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981), the Supreme Judicial Court correctly found no preemption.[3]

2. Recent decisions of FERC expressly support state review of the prudence of a retail company's purchase of electricity at wholesale. For example, in Pennsylvania Power and Light

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2/ See also Spence v. Smyth, 686 P. 2d 597, 600-601 (Wy. 1984).

3/ The company actually concedes the lack of a conflict between the decision below and Nantahala. The company acknowledges that a question of the prudence of buyers in wholesale transactions was a "question left open in Nantahala."

(footnote continued)

Company, 23 FERC ¶ 61,006 (1983), FERC determined that "the [state regulator] has authority to evaluate the prudence of [the purchasing utility's] purchase in retail rate proceedings." 23 FERC at 61,018. As to its own authority to review the prudence of the purchase of power at wholesale, FERC has stated that the prudence of a purchasing utility in a wholesale transaction is not an issue

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(footnote continued)

Pet. 13. Nantahala refers to "cases treating the reasonableness of purchasing from a particular source of, rather than paying a particular rate for, FERC-approved power." Nantahala, slip. op. at 18-19, citing Pike County Light & Power Co. v. Pennsylvania Public Utility Commission, 77 Pa. Commn. 268, 273-274, 456 A. 2d 735, 737-738 (1983); Kansas-Nebraska Natural Gas Co. v. State Corp. Comm'n, 4 Kan. App. 2d 674, 679-680, 610 P. 2d 121, 127 (1980).

generally within the scope of those considered in reviewing the rates and terms of the sale. Pennsylvania Power and Light Company, 23 FERC ¶ 61,325 at 61,716 (1983). FERC also has stated that it considers the relevant issues before it to be limited to the question of the justness and reasonableness of the filed terms of the wholesale transaction. Id.

More recently, FERC has stated that the proper forum for the review of the wholesale purchaser's prudence is the retail rate proceeding in which the purchaser proposes to pass on to its ratepayers the costs of the power purchased at wholesale. Southern Company Services, Inc., 26 FERC ¶ 61,360 at 61,795 (1984), citing Southern Company Services, Inc.,

20 FERC ¶ 61,332 (1982).[4/] Since the FPA expressly confers on the states exclusive jurisdiction over retail rates, the review of the prudence of the wholesale purchaser falls squarely within the authority of the MDPU. See, e.g., Mass. Gen. Laws Ann. ch. 164, § 94G, Pet. 68a-75a.

The decisions of FERC demonstrate that federal regulation of wholesale rates does not encompass the questions of prudence addressed by the MDPU. If state review is foreclosed as the

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4/ In its order in Southern Company Services, Inc., FERC found that it is "not empowered to disapprove or modify a power sales agreement on the grounds that the buyer may not be making the best possible deal." 26 FERC at 61,795. See also Southern Co. Services, Inc., 28 FERC ¶ 61,349 (1984); Philadelphia Electric Co., 15 FERC ¶ 61,264 (1984).

company suggests, a regulatory gap would exist. See Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 384 (1983) (Congress' purpose in FPA "to fill a regulatory gap, not to perpetuate one.") If, as the company argues, state prudence review will create regulatory tension, Congress and FERC are apparently willing to accept that consequence. See Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984).[5/] The harmony between the decision of the Supreme Judicial Court and the decisions of FERC is a further reason

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5/ See also Arkansas Elec. Coop. v. Arkansas Public Serv. Comm'n, 461 U.S. 375, 381-382 (1983) (Court found no preemption and relied in part on a similar federal declination of jurisdiction over

(footnote continued)

to deny the petition in this case.

II. THE ABBREVIATED COMMERCE AND DUE PROCESS CLAUSE CLAIMS DO NOT INDEPENDENTLY MERIT REVIEW.

1. The company briefly argues that the decision of the MDPU violates the Commerce Clause of the United States Constitution. Art. 1, § 8, cl. 3; Pet. 18. According to the company, the MDPU has impermissibly burdened interstate commerce by "discouraging election of a wholesale supply option sanctioned by FERC." Id. The petition also raises the specter of "differing interpreta-

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(footnote continued)

wholesale rates charged by rural power cooperatives under the supervision of the Rural Electrification Administration).

tions" by different states as to their authority to deny costs "incurred as a result of FERC regulated rates. . . ." Id.

As the Supreme Judicial Court intimated, this argument is merely a recasting of the company's unsuccessful preemption argument. Pet. 21a-22a. Responding to the company's argument that interstate commerce was burdened by an "added" layer of regulation by the MDPU, the Supreme Judicial Court noted that the MDPU's "review of the prudence of retail utilities is not 'added'; the [M]DPU is the agency charged with that function, and the jurisdiction of FERC is expressly limited to exclude that function." Pet. 22a.

This holding follows the settled rule that Congress, in the exercise of its own plenary commerce power, may vitiate

the negative effect of the "dormant" Commerce Clause and "redefine the distribution of power over interstate commerce . . . [to] permit the states to regulate commerce in a manner which otherwise would not be permissible." Southern Pacific Co. v. Arizona Ex. Rel. Sullivan, 325 U.S. 761, 769 (1945). Accord, New England Power Co. v. New Hampshire, 455 U.S. 331, 339-40 (1982). Any action taken by a state within the scope of such delegated congressional authority "is rendered invulnerable to Commerce Clause challenge." Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 653 (1981).

The FPA has similarly "shifted this Court's main focus - in determining the permissible scope of state regulation of utilities - from the constitutional

issues that concerned [it] in Attleboro to analyses of legislative intent." Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 379 (1983) (footnote omitted). The legislative history of the FPA demonstrates that "Congress' purpose in 1935 was to fill a regulatory gap, not to perpetuate one." Id. at 384. With the constitutional question thus framed the court below properly relied upon its statutory holding as the dominant ground for rejecting the company's Commerce Clause claim.[6/] If, as the Supreme

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6/ The petition appears to acknowledge the relation between the company's preemption and Commerce Clause arguments. The company argues that interstate com-

(footnote continued)

Judicial Court correctly held, the FPA permits the states to review a retailer's prudence in making a wholesale purchase, and if the existence of a wholesale contract does not preempt a state law finding of joint responsibility of retail companies for the mismanagement of a nuclear power plant outage, then it cannot credibly be claimed that the MDPU has "burdened" interstate commerce in a way

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(footnote continued)

merce has been unduly burdened because "[w]hatever review and adjudication is necessary can be obtained through timely complaint to FERC." Pet. 18, citing 16 U.S.C. §§ 824d, 824e, 824f and 825e. While the MDPU contests this point, the company's argument demonstrates that its Commerce Clause claim merely recasts its claim under the FPA.

not contemplated by Congress.[7/]

In sum, the Supreme Judicial Court correctly held that the MDPU acted within an area congressionally reserved to the states as part of the federal regulation of electricity. See New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982). Since the company's Commerce Clause claim merely recasts its preemption argument, it presents no independent claim which merits review by the Court.

2. The company also claims that the order of the MDPU violated the company's constitutional right to due pro-

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7/ The decisions of FERC cited in Section I lend further support to the MDPU's position that Congress intended to permit state review of the prudence of retail companies in their wholesale transactions.

cess because its replacement power costs were denied without a "finding of wrongdoing" by the company, and because it was given "no meaningful opportunity to contest the findings relied upon by the MDPU." Pet. 19.

The company does not assert that these issues present a matter of national significance, or that similar claims have received uneven treatment in the lower courts.[8/] Furthermore, the company's due process claim turns upon facts which are unique to this case and decidedly un-

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8/ The Supreme Judicial Court correctly determined that West Ohio Gas Co. v. Public Utilities Commission, 294 U.S 63 (1935), "does not reach the issue whether the imprudence of Boston Edison properly can be imputed to the company in light of its own statutory responsibilities and contractual arrangements with Boston Edison." Pet. 14a.

favorable to the claim. The Supreme Judicial Court determined that the MDPU's finding of imprudent management by Edison rested on substantial evidence adduced in an extensive administrative proceeding and, further, that "[Commonwealth Electric] was offered an opportunity to participate directly in additional hearings on the issue." Pet. 14a. The record demonstrates that the company received clear and persistent notice that the MDPU intended to rely on its Edison findings and to rule on the company's potential responsibility.[9/] Even assuming that

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9/ See, e.g., M.D.P.U. 1003-G-1 (June 11, 1982) (S.J.C. App. 17); M.D.P.U. 1003-G-2 (July 2, 1982) (S.J.C. App. 29) M.D.P.U. 1003-G-3, August 19, 1982 (S.J.C. App. 35); M.D.P.U. 1003-G-5 (August 27, 1982) (S.J.C. App. 44).

the company has properly labeled and preserved a due process issue of significance, the facts unique to this case demonstrate that the Supreme Judicial Court correctly rejected the claim. See Pet. 22a.[10/]

10/ It is difficult to identify any prejudice suffered by the company from the MDPU's use of its findings in the Edison case. One who asserts a constitutional claim of an inadequate hearing must demonstrate how he would have utilized the procedure he alleges to have been denied. Codd v. Velger, 429 U.S. 624, 627-628 (1977). The company has not claimed that it would have contested the issue of Edison's imprudent management more vigorously than Edison. But even if the company had reason to doubt Edison's resolve, nothing precluded the company from intervening in the Edison case to contest the issue of prudence and thereby prevent the eventual disallowance of its own replacement power costs. Its failure to do so represents an independent ground for the rejection of the procedural claim and suggests an additional reason to deny plenary review of the due process issue.

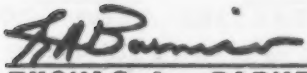
CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

DEPARTMENT OF PUBLIC UTILITIES
of the COMMONWEALTH OF
MASSACHUSETTS

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL



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No. 86-61

In the Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH ELECTRIC COMPANY, PETITIONER

v.

DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether, under the circumstances of this case, the Federal Power Act, 16 U.S.C. 824 *et seq.*, barred the Massachusetts Department of Public Utilities from (a) attributing to a retail seller of electric power a portion of the "imprudence" of its wholesaler in managing a nuclear power plant and therefore (b) denying the retailer's request to recover in its retail rates certain power purchase costs due to an outage at the nuclear plant.

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No. 86-61

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DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS

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BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. The Federal Power Act, 16 U.S.C. 824 *et seq.*, gives the Federal Energy Regulatory Commission exclusive regulatory authority over "the regulation of interstate wholesale utility rates" (*Nantahala Power*

& Light Co. v. *Thornburg*, No. 85-568 (June 17, 1986), slip op. 12). Rates for the sale of power at retail are regulated by the states, but "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price" (*id.* at 11). That is, under the "filed rate doctrine" and the "*Narragansett* doctrine," in order to avoid a prohibited " 'trapping' of costs" (*id.* at 17), the FERC-filed wholesale rate paid by a utility must be treated as "reasonable" by the state regulatory commission in setting retail rates.[1] However, this Court has not resolved the extent to which a state commission may determine for itself, in a retail proceeding, "the reasonableness of purchasing power from a particular source of, rather than paying a particular rate for, FERC-approved power" (*id.* at 18-19).

2. Boston Edison Company is the operator of the Pilgrim I nuclear plant; it also sells electric power at both wholesale and retail to Massachusetts customers. Commonwealth Electric Company, the peti-

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[1] The Federal Power Act requires that utilities file with the Commission "schedules showing all rates and charges for any * * * sale subject to the jurisdiction of the Commission, and the * * * contracts which in any manner affect or relate to such rates * * *." 16 U.S.C. 824d(c). Under the filed rate doctrine, established in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251-252 (1951), "the right to a reasonable rate is the right to the rate which the Commission files or fixes, and * * * the courts can assume no right to a different one * * * ." Under the *Narragansett* doctrine articulated in *Narragansett Electric Co.* v. *Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), cert. denied, 435 U.S. 972 (1978) and endorsed by this Court in *Nantahala*, a state utility agency is required to treat such a FERC-filed rate as "reasonable" (see 119 R.I. at 566, 381 A.2d at 1362).

tioner here, is a public utility that purchases electric power at wholesale and sells electric power at retail to Massachusetts customers. In August 1972, Boston Edison and petitioner agreed that for 28 years petitioner would purchase 11% of the power from Boston Edison's Pilgrim I nuclear plant (see Pet. App. 76a-117a). As the Federal Power Act requires (see note 1, *supra*), petitioner and Boston Edison filed the contract with the Commission, which allowed it to become effective.[2]

From December 7, 1981 to April 8, 1982, the Pilgrim I plant was shut down. During that outage both Boston Edison and petitioner purchased replacement power (under other FERC-filed contracts) that was more expensive than the power they had been receiving from Pilgrim I. When Boston Edison applied to the Massachusetts Department of Public Utilities (DPU), the state regulatory agency, for a retail rate increase to recover the additional cost of that replacement power, the DPU ruled that the Pilgrim I outage was caused by Boston Edison's imprudent plant management (see Pet. App. 39a). When petitioner later applied to the DPU for a similar increase, the DPU denied petitioner's application (*id.* at 28a-30a, 39a-44a), noting that it had previously denied Boston Edison's application (*id.* at 29a, 39a). In petitioner's proceeding, the DPU determined that, under the contract between the two utilities, peti-

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[2] The Commission followed its customary practice of issuing notice of the proposed filing. No comments were received, and the Commission accepted the contract for filing and ruled that it should become effective as of December 9, 1972. The Commission did not purport to interpret the contract or any of its clauses, and it notified the parties that the acceptance for filing did not constitute approval of the contract terms. See Pet. App. 118a-119a.

tioner "shares responsibility for [Boston Edison's] imprudence during the Pilgrim I outage" (*id.* at 41a). The DPU focused on a contractual provision specifying that Boston Edison did " 'not guarantee a constant supply of * * * electricity' " and that petitioner " 'assume[d] the risks on non-delivery of electricity * * * to the same extent as if it were itself operating [Pilgrim I] for the purpose of supplying itself with electricity' " (*ibid.* (quoting Section A-3.1 of the contract)).

The DPU rejected the claim that a different provision in the contract (Section 2.3) set forth petitioner's obligations to its retail customers in the event of an outage. Section 2.3 of the contract states that if, as a result of an outage, "no deliveries are made * * * for one or more periods of at least one hundred twenty (120) consecutive days each, the term of this Agreement * * * will be extended for a period equal to the aggregate of such periods" (Pet. App. 82a). In the DPU's view, while "[s]uch a clause could possibly mitigate damages" in other circumstances, "this particular contract extension, almost twenty years in the future," was insufficient to mitigate damages in this case since "[t]he present value of the benefit is tremendously speculative" (*id.* at 42a). Rather than rely on such uncertain future events, the DPU gave petitioner's retail ratepayers immediate rate relief; the agency reduced petitioner's proposed rate increase by the incremental amount the utility paid for replacement power during the outage, $552,513 (*id.* at 44a).

3. On appeal, the Supreme Judicial Court of Massachusetts affirmed the DPU order (Pet. App. 1a-26a). The court relied on the contractual provisions (*id.* at 6a-7a & n.1) and the state law "schem[illegible]f

public utility regulation" (*id.* at 8a) to hold that "[t]he DPU was warranted in finding that the provisions of the contract reveal the company's intent to be treated as a joint owner and impose the kinds of risks and obligations ordinarily associated with ownership" (*id.* at 8a-9a).

The court next rejected petitioner's claim that federal law preempted the challenged state regulatory action. The court reached that conclusion by applying the standards for assessing claims of preemption established by this Court. First, the court stated that in enacting the Federal Power Act Congress did not "occupy the field of regulation of electricity sales * * * [but] left regulation of sales at retail to the States" (Pet. App. 17a). Next, the court found that petitioner had failed to show that the DPU decision was in " 'actual conflict' " with any federal regulation or that there was a "physical impossibility of compliance with both State and Federal direction" (*ibid.* (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963)). Finally, the court considered whether the DPU decision posed an obstacle to realizing the purposes and objectives of the Federal Power Act. Finding no such obstacle, the court held that since this case involves retail ratemaking the state's "inquiry into the prudence of a retail seller in choosing the source of its supply and in incurring particular costs" did not disturb the federal regulation of rates for wholesale transactions (Pet. App. 19a).

The court ruled also that the DPU's decision did not constitute a collateral attack on FERC's approval of the Boston Edison-Commonwealth contract: "[b]ecause FERC does not have jurisdiction over retail rates, the issue raised here could not, and

should not, have been raised [in the federal administrative process]" (Pet. App. 20a-21a).[3]

DISCUSSION

Although the opinions of the Massachusetts DPU and the Supreme Judicial Court do not make the basis for the state determination entirely clear, we think they are best read to base the denial of the rate increase requested by petitioner on narrow grounds that do not present any question of general importance under this Court's decision in *Nantahala* or under the filed rate and *Narragansett* doctrines. Accordingly, we believe that the case does not warrant this Court's review.

1. In *Nantahala*, this Court reserved the question whether "a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower-cost power is available elsewhere, even though the higher-cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*" (slip op. 19 (emphasis in original)). Both the state court (Pet. App. 19a-20a) and the parties (Pet. 15-16; Br. in Opp. 11-18) suggest that this case presents a version of that question. We disagree: the DPU did indeed bar petitioner from recovering its costs of purchased power on the ground that the purchases were necessitated by imprudence; but the imprudence here—

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[3] One judge dissented (Pet. App. 23a-26a). He would have remanded for the DPU to decide whether FERC had "determined that the agreement was just and reasonable from the point of view of Commonwealth" (*id.* at 25a). If the state agency found that FERC had made such a determination, then the dissenting judge would have concluded that the DPU interpretation of the contract was preempted.

plant mismanagement partially attributed to petitioner by virtue of its contract with the plant operator—is of a different sort from that hypothesized in *Nantahala* and does not, under the circumstances, present questions of general significance.

The denial of the rate increase sought by petitioner was based on two determinations by the Massachusetts DPU, each of which it was entitled to make only because of the somewhat unusual circumstances of this case. First, the DPU determined that Boston Edison, the operator of Pilgrim I, had mismanaged the facility and was responsible for the outage; the DPU had occasion, and jurisdiction, to make such a determination with respect to petitioner's vendor because of the coincidence that Boston Edison also sells power at retail and had applied for, and been denied, a rate increase. Second, the DPU determined that the particular terms of the FERC-filed contract between Boston Edison and petitioner made petitioner responsible for a share of the consequences of the mismanagement of Pilgrim I; the DPU had jurisdiction to make this determination only because FERC had not had occasion to interpret the contract in this respect.[4]

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[4] We fully agree with petitioner (Pet. 14) that a state may not "avoid the 'bright line' between federal and state jurisdiction and the statutory procedure for FERC review of wholesale performance * * * by discovering imprudence in the chain of electric supply and then imputing such imprudence to the retail electric company over which it has jurisdiction * * *." But that is not what happened here: the DPU found imprudence in a retail rate proceeding involving a utility (Boston Edison) over which it had jurisdiction and which it found to have acted imprudently; it imputed the imprudence in respect of the same outage to petitioner because it found warrant for doing so in a contract that had not yet been inter-

Neither determination presents an issue of general importance under *Nantahala*. First, plant mismanagement is quite different from the imprudence under discussion in *Nantahala*. The allegation that a utility selling at retail should have chosen to acquire power from Source A, rather than from Source B under a FERC-filed rate schedule, may raise a significant question as to whether the state regulator has power to resolve that issue (see *Nantahala*, slip op. 19, citing *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n*, 77 Pa. Commw. 268, 273-274, 465 A.2d 735, 737-738 (1983)). But the allegation that a utility selling at retail is not entitled to recover the cost of purchased power because it has mismanaged its production facility raises no such question: it is clear that the state regulator may deny a rate increase on that ground, as the Massachusetts DPU did with respect to Boston Edison. See *Violet* v. *FERC*, 800 F.2d 280, 282 (1st Cir. 1986) (citing *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Comm'n*, 262 U.S. 276, 289 (1923) (Brandeis, J., concurring)).[5]

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preted by FERC. Had Boston Edison sold power only at wholesale, its right to pass on to its customers its costs resulting from the outage, and its obligation if any to reimburse customers for costs incurred by them, could only have been determined by FERC, which would have had to resolve any question of plant mismanagement or of contract interpretation necessary to determine Boston Edison's rights and obligations. Conversely, had petitioner been the manager of its own power production facility, there would be no question of the state's power to deny a retail rate increase on the basis of a state finding that the facility was mismanaged. See, *e.g.*, *Violet* v. *FERC*, 800 F.2d 280, 282 (1st Cir. 1986).

[5] Petitioner contends (Pet. 19) that it was not afforded an opportunity to rebut the charge of mismanagement by Boston

The DPU's second determination—that petitioner could be held partially responsible for the imprudent management of Pilgrim I—presents a more difficult question. But although there is language in both the DPU and state court opinions that we find troubling,[6] we agree with the court that, at bottom, the DPU decided that question "based on the provisions of the contract between [petitioner] and Boston Edison" (Pet. App. 5a). Under the circumstances of this case, neither the assumption by the Massachusetts DPU of the burden of interpreting the contract, nor the interpretation it reached, presents any question of wider importance.

A FERC interpretation of the contract would of course have been binding on the parties and the

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Edison. Respondent disputes this as a factual matter (Br. in Opp. 26). In any event it does not present an issue that warrants this Court's consideration.

[6] For example, the court stated (Pet. App. 7a n.2) that "actual or constructive ownership is [not] a prerequisite to imputation of imprudence to a public utility. * * * It is not the company's similarity to an owner that is dispositive, however, but its nondelegable statutory obligations."

If the court was suggesting that, notwithstanding the terms of a FERC-filed contract, a utility selling at retail may have a duty under state law to obtain better terms or performance from its wholesaler than the contract prescribes, or that it may bear automatic (rather than contractual) responsibility for its wholesaler's performance, the suggestion is entirely incorrect. Any such "nondelegable duty" (see also *id.* at 9a n.4) would impeach the FERC-filed contract in a manner clearly barred by *Nantahala*. In this case, however, we read the court's decision as resting on an interpretation of the contract that imposes actual or constructive ownership obligations on petitioner; the suggestion that such a finding would not have been necessary is erroneous but appears to be dictum. See Pet. App. 7a & n.2.

DPU. FERC is responsible for ensuring that all rates or charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy in interstate commerce are "just and reasonable" (16 U.S.C. 824d(a)). The Commission therefore exercises exclusive authority to set rates and to approve or modify contracts at the wholesale level. See, *e.g.*, *Nantahala*, slip op. 10 (quoting *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 581 (1981). And where FERC has interpreted a filed contract, its interpretation becomes part of the filed rate, and ~~that~~ the state is bound to honor it. See *AEP Generating Co.*, 38 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,243, at 61,823 (1987); *AEP Generating Co.*, 32 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,364, at 61,821 (1985), on reh'g, 36 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,226, at 61,549-61,550 (1986).[7] But where the Commission has not provided an interpretation, the state may do so when necessary to fulfill its obligation to set retail rates. *Ibid.*[8]

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[7] Petitioner could have sought an interpretation of its contract from FERC prior to the DPU and state court proceedings and, indeed, may still do so now. See, *e.g.*, *AEP Generating Co.*, on reh'g, 36 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,226, at 61,551 n.3 ("there are, and have been, a variety of procedural options available for a party to solicit such an interpretation. For example, the utilities or any affected state commission could have requested a declaratory order [from FERC] as soon as a disagreement became evident."); *Kentucky Power Co.*, 36 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,227, at 61, 554 (1986).

[8] Should the Commission later interpret a contractual provision previously interpreted by the state, the federal interpretation would preempt any conflicting state interpretation (even though the state's view would have been acceptable and

A state interpretation that effectively modifies the terms of the FERC-filed contract would of course be preempted by the federal regulatory scheme.[9] And it may be difficult in some cases to draw the line between permissible contract interpretation and impermissible contract modification. In the present case, the DPU found that petitioner had, by contract "assumed the risks of ownership" (Pet. App. 40a), that "in this instance [petitioner's] life-of-the-unit contract creates [in petitioner] the obligations and privileges of a joint owner" (Pet. App. 41a), and that accordingly petitioner "shares responsibility for [Boston Edison's] imprudence" (*ibid.*). The state court affirmed this reading. While that is not necessarily the reading FERC would have endorsed had it been presented with this question of contract interpretation, we cannot conclude that the result was impermissible (in the absence of a FERC determination to the contrary) or that it presents any question that merits this Court's review.[10]

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controlling in the absence of Commission action). See *AEP Generating Co.*, 38 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,243, at 61,823 (1987).

[9] In some circumstances, not present here, the Commission effectively has exclusive jurisdiction over the interpretation of contracts. For example, a state would have no role in regulating a contract for wholesale transactions between the subsidiaries of a fully integrated holding company. See *AEP Generating Co.*, 38 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,243; *Mississippi Industries* v. *FERC*, 808 F.2d 1525, 1547-1549 (D.C. Cir. 1987), petitions for cert. pending, No. 86-1380 (filed Feb. 20, 1987), No. 86-1424 (filed Mar. 4, 1987), reh'g en banc granted on other grounds, No. 85-1611 (D.C. Cir. Apr. 3, 1987).

[10] The state court's rejection of Commonwealth's argument concerning the outage provision (Section 2.3) may also be

2. This case does not present any issue of general significance under the filed rate and *Narragansett* doctrines. As described above, it arose in an atypical fact situation—the happenstance that the same state regulator had jurisdiction, and the opportunity, to determine, in different retail rate proceedings, both the question of the mismanagement of the plant by one utility and the question of imputation of that mismanagement to another utility. Moreover, the case turns on the ultimately factual determination of mismanagement and on the interpretation of a contract that FERC had not had occasion to interpret. The case therefore does not warrant an exercise of this Court's certiorari jurisdiction.

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justified as permissible contract interpretation. Section 2.3 may be read to govern only the relationship between the two utilities, thus creating a remedy that Commonwealth could invoke against Boston Edison but not altering the fact that under the contract Boston Edison and petitioner shared responsibility for the outage. While neither the state court nor the DPU expressly relied on that interpretation of Section 2.3, they reached the same result that that interpretation would have produced.

Both the DPU (Pet. App. 42a n.1) and the state court (*id.* at 8a-10a) found as a matter of public policy that Commonwealth could not insulate imprudent plant management from review in retail ratemaking proceedings. We do not agree that that proposition would govern in every case. For example, if FERC approved a contract or rate schedule that precluded review of particular subjects in retail ratemaking proceedings, then state scrutiny of those subjects would be barred. The question raised by this hypothetical is not, however, present in this case.

Finally, this case is not like *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. at 578-579, in which the state court ordered a remedy—an actual change in the wholesale rate—that directly and clearly conflicted with the rate on file with FERC.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 86-61.

In the

Supreme Court of the United States.

OCTOBER TERM, 1986.

COMMONWEALTH ELECTRIC COMPANY,
PETITIONER,

v.

DEPARTMENT OF PUBLIC UTILITIES OF
THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Petitioner's Reply Memorandum.

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No. 86-61.

In the

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OCTOBER TERM, 1986.

COMMONWEALTH ELECTRIC COMPANY,
PETITIONER,

v.

DEPARTMENT OF PUBLIC UTILITIES OF
THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Petitioner's Reply Memorandum.

The Petitioner, Commonwealth Electric Company ("Com/Electric"), hereby submits this Reply Memorandum to respond to the Solicitor General's arguments that this case presents an "atypical" fact pattern and that it is not, therefore, appropriate to review the "troubling" aspects of the decision below on certiorari. Com/Electric submits that this case presents a clear challenge to the "bright line" between federal and state jurisdiction over electric utilities, which challenge is likely to recur

in numerous cases if this Court does not address the question left open in *Nantahala Power & Light Co.* v. *Thornburg*, ___ U.S. ___ (No. 85-568, June 17, 1986) (that decision left open the question of a state commission's jurisdiction to "trap" a retail electric company's purchased power costs when retailer imprudence is alleged to exist, slip opinion at 19).

Discussion.

Although the Solicitor General disagrees with many of the statements appearing in the decisions below and in the Respondent's Brief in Opposition,[1] he argues that certiorari should be denied because this case is "atypical" (SG Br. 12). The Solicitor General is mistaken.

A. *This Case Is Not Atypical.*

1. Many Electric Companies Are Both Wholesalers and Retailers.

The Solicitor General argues that this case is atypical because the imprudent wholesaler (BECO) was both a wholesaler sub-

[1] The decision below relies heavily on Com/Electric's "nondelegable" state law duties as the legal basis for the MDPU decision (Pet. App. 7a n.2, 8a n.3, 9a n.4, 10a, 12a, 13a, 14a; see also MDPU decision, Pet. App. 41a, and Br. in Opp. 13). The Solicitor General does not believe that nondelegable state law duties were the true basis for the decision below, *see* note 4, *infra*, but strongly disagrees that nondelegable duties could ever be the basis for such a decision (SG Br. 9 n.6).

The decision below and Brief in Opposition state that only issues of state law and retailer prudence are involved, and that FERC has no jurisdiction over the dispute in this case (Pet. App. 20a-21a, 22a; Br. in Opp. 10, 17-18). The Solicitor General disagrees and states that FERC does have jurisdiction over the dispute in this matter but that there is dual jurisdiction over this dispute until state commission jurisdiction is displaced by a request that FERC exercise its jurisdiction (SG Br. 9-10, 10 n.7 & n.8).

ject to the jurisdiction of FERC and a retailer subject to the jurisdiction of the Respondent (MDPU) (SG Br. 7, 12). Contrary to the Solicitor General's suggestion, this case does not present an atypical fact pattern. Electric utilities frequently act as both wholesalers and retailers, thus coming under the dual jurisdiction of both FERC and state utility commissions. Examples are abundant throughout the country.[2] Thus, in many cases a state commission has an opportunity to consider the prudence of an electric company which serves as both a retailer and a wholesaler.

If undisturbed, the decision below will, at a minimum, permit state commissions to determine the prudence of wholesalers over whom they have retail jurisdiction, to rely on local law

[2] As this Court pointed out in *Nantahala*, Nantahala Power & Light Company was both a retailer subject to the jurisdiction of the Utilities Commission of North Carolina and a wholesaler subject to the jurisdiction of FERC (slip opinion at 1 & 3). Similarly, the four operating companies in the Middle South Utilities system (Louisiana Power & Light Co., New Orleans Public Service, Inc., Arkansas Power & Light Co., and Mississippi Power & Light Co.) all sell electricity at wholesale and retail. *Mississippi Industries* v. *F.E.R.C.*, 808 F.2d 1525, 1528 (D.C. Cir. 1987), *petitions for cert. filed*, Nos. 86-1380 and 86-1424, *reh'g granted*, No. 85-1611 (D.C. Cir. Apr. 3, 1987). Price squeeze cases always involve utilities selling at wholesale and at retail. *See, e.g., Boroughs of Ellwood City* v. *F.E.R.C.*, 731 F.2d 959 (D.C. Cir. 1984) (Pennsylvania Power Company); *Kansas Cities* v. *F.E.R.C.*, 723 F.2d 82 (D.C. Cir. 1983) (Kansas Gas and Electric Company); *Cities of Batavia* v. *F.E.R.C.*, 672 F.2d 64 (D.C. Cir. 1982) (Commonwealth Edison Company); *City of Groton* v. *Connecticut Light & Power Co.*, 497 F.Supp. 1040 (D. Conn. 1980), *rev'd in part*, 662 F.2d 921 (2d Cir. 1981) (Connecticut Light & Power Company). For other examples of utilities selling electricity at wholesale and at retail see, *Otter Tail Power Co.* v. *U.S.*, 410 U.S. 366, 368 (1973), *reh'g denied*, 411 U.S. 910 (1973) (a retail electric company selling power in Minnesota, North Dakota and South Dakota was enjoined from refusing to sell power at wholesale in the same states); *Virginia Electric & Power Company*, 19 FERC (CCH) ¶ 61,333, at 61,640 (1982) (approving a wholesale fuel adjustment clause similar to that used for the same utility's Virginia retail customers); *Minnesota Power & Light Company*, 11 FERC (CCH) ¶ 61,312, at 61,645 (1980) (involving FERC review of wholesale rates for the 15% of the utility's business which is not retail sales); *Southern California Edison Company*, 8 FERC (CCH) ¶ 61,198, at 61,680 (1979), *aff'd sub nom., Anaheim* v. *F.E.R.C.*, 669 F.2d 799 (D.C. Cir. 1981) (involving FERC review of wholesale rates for the 10% of the utility's customers who are not subject to the jurisdiction of the California Public Utilities Commission).

to impute any imprudence found to other retailers who purchase power from the first company (even though there has been no decision by FERC adjudicating wholesale imprudence), and to penalize the retailers for their wholesaler's "imprudence." The effect will be to "trap" retailer costs since a state commission has no jurisdiction to prevent the "imprudent" wholesaler from charging its retailer customers the FERC approved tariff.[3]

2. The Decision Below Was Not Based on State Commission Interpretation of a Federal Rate.

Contrary to the Solicitor General's position (SG Br. 7 n.4, 9, 9 n.6), the decisions of the MDPU and of the court below were not based upon interpretation of the applicable federal rate (the Pilgrim Contract). Close reading of the decision below

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[3] Com/Electric submits that state commissions are preempted from acting as the MDPU did in this case. FERC has jurisdiction to determine wholesaler imprudence, *see* Federal Power Act §§ 205, 206, 207 and 306, 16 U.S.C. §§ 824d, 824e, 824f and 825e; *see also, Attorney General* v. *New England Power Company*, 33 FERC (CCH) ¶ 63,042 (1985), and is not bound by state commission findings, in proceedings within their jurisdiction, that the same utility was imprudent for retail purposes. *Minnesota Power & Light Company*, 11 FERC (CCH) ¶ 61,312, at 61,645 (1980). *See also, Virginia Electric & Power Company*, 19 FERC (CCH) ¶ 61,333 (1982); *Southern California Edison Company*, 8 FERC (CCH) ¶ 61,198 (1979), *aff'd sub nom., Anaheim* v. *F.E.R.C.*, 669 F.2d 799 (D.C. Cir. 1981). FERC also has declined to impute an MDPU finding of BECO's imprudence as a retailer to one of BECO's wholesale customers. *New England Power Company*, 31 FERC (CCH) ¶ 61,047, at 61,080 and 61,085 (1985), *aff'd sub nom., Violet* v. *F.E.R.C.*, 800 F.2d 280 (1st Cir. 1986).

The mischief caused by the case before the Court is extensive since the Respondent believes that it has jurisdiction to determine the prudence of out-of-state wholesalers over whom it has no retail jurisdiction and to impute such imprudence to a retailer over whom it does have jurisdiction. Thus, in *Cambridge Electric Light Co.*, M.D.P.U. 85-2F-1 (1986), appeal docketed at the Massachusetts Supreme Judicial Court as C.A. No. 86-115, the MDPU inquired into the prudence of a Connecticut wholesaler, found the wholesaler to be imprudent, imputed such imprudence to the Massachusetts retailer based upon local law (including the MDPU decision which is the subject of the Petition before this Court), and on that basis restricted the retailer's recovery of replacement power costs incurred during an outage at the Connecticut wholesaler's plant. The Solicitor General apparently agrees with Petitioner that such action by a state commission is improper (SG Br. 8 n.4).

discloses that no attempt was made to interpret the Pilgrim Contract. The MDPU did not attempt to adjudicate any rights between the parties to the Pilgrim Contract. Instead, the MDPU merely examined the Pilgrim Contract to see if it contained sufficient provisions to permit Com/Electric to be charged with BECO's imprudence under state law. Thus, contrary to the Solicitor General's position, this case does not involve state commission interpretation of a federal contract in the absence of a FERC interpretation.

The issue presented by this case is the one which Petitioner has posed — whether, in the absence of any retailer imprudence, federal law permits a state commission to determine a wholesaler's imprudence and then impute that imprudence to the retailer. If undisturbed, the decision below will permit state commissions to use local legal doctrines as a basis for inquiry into imprudence anywhere in the chain of electric supply.

B. *The Issues Presented in This Case Are Important.*

When this case is viewed in its proper light, it is apparent that it presents a serious threat to the Filed Rate Doctrine, the Narragansett Doctrine, this Court's recent decision in *Nantahala,* and the decisions cited therein. Although *Nantahala* forcefully rejected state commission efforts to "trap" retailer costs, that case did not address situations in which imprudence has been alleged or found. The court below held that its own Filed Rate Doctrine case, *Eastern Edison Co.* v. *Department of Public Utilities,* 388 Mass. 292, 446 N.E.2d 684 (1983) was not controlling because no question of imprudence had been raised in *Eastern Edison* (19a n.11). The questions raised by this case are, thus, significant ones affecting the national system of wholesale electric supply.

This case presents the Court with an opportunity to examine and decide the extent of a state commission's jurisdiction to

"trap" a retailer's costs based on a wholesaler's alleged imprudence. The states should not be permitted to adopt and expand upon the analysis of the Massachusetts court because of an absence of guidance from this Court.

C. *Certiorari Should Be Granted.*

Petitioner respectfully submits that the writ should be granted and the case set down for full briefing and argument on the merits. In the alternative, Com/Electric submits that this Court should grant the writ of certiorari and remand the case for reconsideration. The reasoning of the decision below is unclear[4]

[4] The Solicitor General charitably describes the decision below as "not . . . entirely clear" (SG Br. 6) and "troubling" (SG Br. 9). It is more than that.

The MDPU Brief in Opposition, Dissent below and the Solicitor General do not agree on the basis for the majority's decision below. The Brief in Opposition suggests that the decision below was based on a state law conclusion that Com/Electric shares the responsibility for the imprudence of its wholesale supplier (Br. in Opp. 4, 11). The Dissent below seems to believe that the majority's decision was based on Com/Electric's imprudence in entering into a FERC filed contract which made it assume the risk of service interruptions (Pet. App. 26a). The Solicitor General believes that the decision below was based on MDPU's interpretation of the Pilgrim Contract (SG Br. 7 n.4, 9, 9 n.6).

Furthermore, although not discussed by the Solicitor General, the decision below and Brief in Opposition place great emphasis on cases holding that state commissions are not preempted from considering the prudence of a retailer's choice among supply options (Pet. App. 19a-20a (majority), 24a-26a (dissent); Br. in Opp. 6, 14-17), but this case involves no issue of imprudent retailer choice or actions. It is undisputed that the MDPU did *not* make any finding that Com/Electric had been imprudent in any of its own actions (Pet. App. 42a). There has been no suggestion that Com/Electric made an imprudent decision when it entered the Pilgrim Contract or when it decided among replacement power alternatives during the Pilgrim 1 outage. In fact, the record demonstrates that the Pilgrim Contract had provided low cost power for Com/Electric's customers for over a decade and that 80% of the replacement power purchased by Com/Electric was the cheapest oil-generated power in New England.

The dissenting judge below seems to have been troubled by the majority's discussion of imprudent choice since he would have remanded the case to see if Com/Electric had made any imprudent choice among supply options (Pet. App. 25a-26a).

and such decision was issued before this Court issued *Nantahala*. Therefore, the decision below does not discuss whether the MDPU impermissibly caused Com/Electric to suffer "trapped costs" in violation of *Nantahala*.[5] Accordingly, if this Court declines to set this case down for briefing on its merits, the case should be remanded for reconsideration.

Conclusion.

For the foregoing reasons, the writ of certiorari should be granted and the case either (i) set down for briefing on its merits, or (ii) remanded to the Massachusetts Supreme Judicial Court with instructions that the case be reconsidered in light of this Court's recent *Nantahala* decision.

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[5] The time for reconsideration of the decision below had passed before *Nantahala* was issued. Petitioner's out of time request that the decision below be reconsidered in light of *Nantahala* was denied without comment just eight days after it was filed.